No. 78-1756

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN MITCHELL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

KENT L. JONES
Assistant to the Solicitor General

ROBERT L. KLARQUIST
JOSHUA I. SCHWARTZ
Attorneys
Department of Justice
Washington, D.C. 20530

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CITATIONS

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App., *infra*, 1a-17a) is reported at 591 F.2d 1300.

JURISDICTION

The decision of the Court of Claims was filed on January 24, 1979. On April 19, 1979, The Chief Justice extended the time for filing a petition for a writ of certiorari to and including May 24, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States is answerable in money damages for alleged breaches of trust in connection with the management of forest resources situated on lands allotted to individual Indians under the General Allotment Act of 1887.

STATUTES INVOLVED

1. Section 5 of the General Allotment Act of 1887, ch. 119, 24 Stat. 389, 25 U.S.C. 348, provides in pertinent part:

> Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * * and that at the expiration of said period the United States will convey the same by patent to said Indian * * *, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *.

2. 28 U.S.C. 1491 provides in relevant part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

3. 28 U.S.C. 1505 provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

STATEMENT

1. In four actions consolidated before the Court of Claims, respondents seek to recover damages from the United States for the alleged mismanagement of timber resources on lands allotted to individual Indians from the Quinault Reservation in the State of Washington. The respondents are 1,465 individuals owning interests in such allotments, the Quinault

Tribe which now holds portions of the allotted lands, and an unincorporated association of Quinault Reservation allottees.

The Quinault Reservation was established in 1873 by Executive Order. I C. Kappler, *Indian Affairs* 923 (2d ed. 1904). Between 1905 and 1935 the entire Reservation was allotted to individual Indians under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, 25 U.S.C. 331-348. Section 5 of the Act, 25 U.S.C. 348, provided that the United States would "hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * *." This statutory language was reproduced on the deed given to each allottee. The period during which the United States was to hold the land thus allotted was subsequently extended indefinitely by the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 462.

The allotments from the Quinault Reservation consisted primarily of forest lands. The forest resources on the allotted lands have been managed by the Department of the Interior, which has sold the timber from individual allotments and managed the revenue from the sales. The Secretary of the Interior was authorized by the Act of June 25, 1910, ch. 431, 36 Stat. 857, 25 U.S.C. 406, to approve the sale by the "owner" of timber on any Indian land "held under a trust or other patent containing restrictions on alienations * * *." In approving such sales, the Secretary is directed to consider the state of growth of

the timber and the present and future financial needs of the allottee and his heir; the Secretary is authorized to charge an administrative fee for his services. *Ibid.* Since 1934, the Secretary has been directed to adhere to the principles of sustained-yield forestry on Indian forest lands under his supervision. 25 U.S.C. 466.

Respondents alleged that the Secretary has engaged in several improper practices in connection with his management of timber lands allotted from the Quinault Reservation under the General Allotment Act. They allege that he has (App., *infra*, 2a-3a n.4):

(1) failed to obtain a fair market value for timber sold;

(2) failed to manage timber on a sustained yield basis;

(3) failed to obtain payment for some merchantable timber;

(4) failed to develop a proper system of roads and easements, and exacted improper charges from allottees for roads;

(5) failed to pay interest on certain funds;

(6) paid insufficient interest on certain funds;

(7) exacted excessive administration fees from allottees.

They contend that they are entitled to recover in money damages for the alleged misdeeds because the Secretary's actions have breached the fiduciary duty owed them by the United States as trustee of the allotted lands.

2. The United States moved to dismiss respondents' actions in the Court of Claims on the ground that the United States had not consented to these suits or otherwise waived its sovereign immunity in respect of such claims. The Court of Claims, sitting *en banc*, denied the government's motion. The court held that, by enacting the General Allotment Act, Congress created a cause of action for damages against the United States in favor of Indian allottees whenever they can show a "breach of trust" by the government in the management of their lands (App., *infra*, 6a).[1] The court concluded that

> the congressional declaration of trust "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" because of a proven breach of trust.

Ibid., quoting United States v. *Testan*, 424 U.S. 392, 400 (1976).

[1] The court concluded that "breach of trust" claims brought under the General Allotment Act by individual allottees are within its jurisdiction under 28 U.S.C. 1491 as claims founded upon an "Act of Congress," *ibid.* (see App., *infra*, 4a-6a). The court stated that similar claims brought by the Indian tribe are therefore within its jurisdiction under 28 U.S.C. 1505 (App., *infra*, 4a, 7a). The court did not consider whether individual claims would be within its jurisdiction as claims "for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491 (see App., *infra*, 5a). Nor did the court reach the question whether the Quinault Allottees Association is a "tribe, band or other identifiable group of American Indians," whose claims lie under Section 1505.

REASONS FOR GRANTING THE PETITION

The decision of the Court of Claims is based on a misapplication of *United States* v. *Testan*, 424 U.S. 392 (1976). The ruling threatens significantly to enlarge the government's liability to suit in an area where consent has not been given.[2]

1. In *United States* v. *Testan*, *supra*, 424 U.S. at 399, quoting *United States* v. *King*, 395 U.S. 1, 4 (1969), this Court reiterated the basic principle "that a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.'" The Court held that where, as here, the claim for money damages is based on a statute, there is no waiver of immunity unless the statute "'in itself * * * can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" 424 U.S. at 402, quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967).[3]

[2] We follow the terminology of the *Testan* opinion in speaking of a failure to lift the bar of "sovereign immunity." Technically, it may be that the Tucker Act itself waives the otherwise absolute immunity of the United States from being sued *eo nomine* when another statute creates a right of action in damages against the government for breach of the statutory command. But it cannot matter how the point is articulated. It is entirely clear that no recovery can be had under the Tucker Act in respect of a claim "founded on * * * an Act of Congress" unless the statute invoked, construed in light of the doctrine of sovereign immunity, can be said to make the United States answerable in damages for the performance (or non-performance) of federal officials under the cited provision.

[3] The Court noted in *Testan* that, as applied to claims based on an "Act of Congress," the Tucker Act is "only a juris-

Although the Court of Claims agreed that the General Allotment Act does not expressly provide that damages may be "recovered for breach of the trust," the court reasoned that this "is the necessary inference from the statute" (App., *infra*, 7a). The court reasoned that denying a remedy in damages for breach of trust would mean that "there is in effect no real redress at all for a departure from the standards Congress imposed on the Government in the General Allotment Act" (*ibid.*). As we will show, the decision of the Court of Claims is based on a misunderstanding of *Testan* and of the purposes of the General Allotment Act.

a. There is nothing in *Testan* to support a conclusion that a court may "infer" a waiver of immunity from the nature of the duty that Congress has imposed. To the contrary, *Testan* reiterates that the waiver must be "unequivocal," 424 U.S. at 399, and that a statute claimed to effect a waiver must "*in itself* * * * fairly be interpreted as *mandating* compensation" (*id.* at 402; emphasis added). Whatever

dictional statute * * *." 424 U.S. at 398, 400. The Court rejected the claim that the Tucker Act waived the sovereign immunity of the United States for money damage claims based on the violation of statutory duties. *Ibid.*; see *id.* at 400-401. But see note 2, *supra*. In this regard, the Court distinguished claims under the Tucker Act that are based on contract or for money "improperly exacted or retained." 424 U.S. at 400, 401. But none of respondents' claims, with the possible exception of the claim based on excessive administration or road fees (App., *infra*, 13a-14a n.19), are for money improperly exacted or retained. Nor are any of the claims arguably founded on an "express or implied contract with the United States."

substantive duties the General Allotment Act may be said to have imposed, it is plain that nothing in the statute itself even considers, much less mandates, that money damages must be available as a remedy for a breach of its obligations.

Even though the General Allotment Act does not purport to establish a cause of action in damages for violations of its duties, the Court of Claims concluded that such a remedy necessarily must be inferred because otherwise there are no suitable means of enforcing the Act. This is a *non sequitur*. In *Testan*, this Court rejected "as unsound" the claim that a statute establishing substantive rights "of necessity create[s] a waiver of sovereign immunity such that money damages are available to redress their violation." 424 U.S. at 400-401. Moreover, allottees are not wholly without remedies to protect their interest in the allotted lands. Alleged violations of "trust" duties under the General Allotment Act may be remediable by injunctive or mandamus actions against the Secretary under 28 U.S.C. 1331(a), 1361. See also 5 U.S.C. 702.[4] Furthermore, actions

[4] To be sure, in *Naganab* v. *Hitchcock*, 202 U.S. 473 (1906), the Court dismissed as an unconsented suit against the United States an action by allottees to enjoin the Secretary from implementing regulations that would have prohibited certain exploitive forestry practices on allotted lands. We assume, however, that the authority of that case—insofar as it bars injunctive relief—has been eroded by subsequent decisions and legislation, including 5 U.S.C. 702. On the other hand, *Naganab* may remain instructive in its holding that, at the time, there was "no Act of Congress authorizing [the] action" (202 U.S. at 476). This indicates the Court's view that the

by the Secretary that constitute an appropriation of the allotted lands may be remediable in a suit for damages under the Fifth Amendment. See *Testan* v. *United States, supra*, 424 U.S. at 401; *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935); *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933). Here, as in *Testan, supra*, 424 U.S. at 403:[5]

> [t]he situation * * * is not that Congress has left the respondents remediless, * * * but that Congress has not made available * * * the remedy of money damages * * *.

b. The legislative history of the General Allotment Act supports the conclusion that the statute does not waive sovereign immunity for any "breach of trust" in connection with federal administration of the allotted lands. In determining to "hold the land thus allotted * * * in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * *," 25 U.S.C. 348, Congress in-

General Allotment Act itself did not waive sovereign immunity.

[5] In *Whiskers* v. *United States*, Civ. No. C 314-73 (D. Utah, Mar. 22, 1977), appeal pending, No. 77-1620 (10th Cir.), the district court concluded that the Southern Paiute Distribution Act, Pub. L. No. 90-584, 82 Stat. 1147, did not waive the sovereign immunity of the United States for claims based on an alleged trust responsibility under the Act. The court noted (slip op. 6) that, even if the Act purported to create a trust duty, there is nothing in the Act that establishes a right to money damages for breach of trust, and there is thus no waiver of sovereign immunity under *Testan*.

tended that the allotments would serve the function of homesteads for the allottees and would be occupied by them for personal use in agriculture or grazing. See *Mattz* v. *Arnett*, 412 U.S. 481, 486 (1973); 13 Cong. Rec. 3211 (1882) (Sen. Dawes) (the allottee is to be "the occupant of the land and enjoy all its use * * *"). The government was not expected to undertake management responsibilities in connection with the allotted lands; rather, the purpose for which the United States held title to the land for the allottees was (a) to restrain improvident alienation of the land by the allottees and (b) to afford an immunity from state taxation for the allotted lands. See 13 Cong. Rec. 3211-3212 (1882) (Sen. Dawes); 15 Cong. Rec. 2240-2242 (1884) (remarks of Senators Dawes, Coke and Conger); 15 Cong. Rec. 2278-2279 (1884) (remarks of Senators Miller, Coke and Dawes). The Court of Claims' broad conclusion that a damage remedy for "breach of trust" is "mandate[d]" as a means of enforcing the Act is inconsistent with the narrow objectives that Congress sought to accomplish in enacting this legislation.[6]

Subsequent to enactment of the General Allotment Act, Congress authorized the Secretary to supervise sales of timber on allotted lands and other Indian lands "held under a trust or any other patent containing restrictions on alienations * * *." 25 U.S.C.

[6] A very different case would be presented if the claim were that the United States had misused its position as titleholder to sell the allottee's land and had failed to account. See also note 3, *supra*.

406. See also 25 U.S.C. 466. But, significantly, Congress did not distinguish between "trust" lands and other restricted lands. No doubt for that reason, the Court of Claims abjured any reliance (App., *infra*, 12a) on the management statutes in ruling broadly that the General Allotment Act waives sovereign immunity for "breach of trust" claims by Indian allottees (*id.* at 6a).[7]

2. The decision of the Court of Claims is unprecedented in its broad conclusion that sovereign immu-

[7] There are, of course, numerous decisions in this Court that refer to the fiduciary or guardianship responsibilities of the United States in its dealings with Indian tribes. *E.g.*, *United States* v. *Kagama*, 118 U.S. 375, 384 (1886); *McKay* v. *Kalyton*, 204 U.S. 458, 469 (1907); *United States* v. *Creek Nation*, *supra*, 295 U.S. at 109-110; *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942). None of these cases, however, have presented and confronted the question whether the United States has waived its sovereign immunity for "breaches of trust" in connection with lands allotted under the General Allotment Act. In *United States* v. *Mason*, 412 U.S. 391, 398 (1973), the United States did not argue that it was immune to a suit for money damages by allottees who claimed that the government committed a breach of trust by failing to resist state tax assessments on the allotted lands. The government's defense on the merits was sufficient in that case, *id.* at 392, and sovereign immunity was not raised. It should be noted, however, that one of the two purposes for which Congress held the title of allotted lands "in trust" was to protect the lands from state taxation. See page 11, *supra*. A failure to accomplish that objective may, in some circumstances, be a breach of the limited duty established by the Allotment Act, and thus arguably may support an inference, in this narrow context, that sovereign immunity was waived. But see pages 7-12, *supra*. In this case, however, the Court of Claims inferred a waiver of immunity as to duties that the Act did not impose.

nity has been waived as to claims for money damages brought by allottees under the theory of "breach of trust." The ramifications of such a broad holding are difficult to anticipate with certainty, though it seems plain that they are serious. Damages claimed in this suit alone may aggregate $100 million, and many similar claims may be anticipated.[8] The question presented in the petition is thus of substantial importance and warrants review by this Court.

[8] See, *e.g.*, *Duncan* v. *United States*, No. 10-75 (Ct. Cl. Apr. 18, 1979), slip op. 6, in which the Court of Claims relied on the decision in this case in concluding that the court may award damages for "breach of trust" in the administration of Indian lands that are not subject to the General Allotment Act. See, also, *Cherry* v. *United States*, No. 73-77 (Ct. Cl. Feb. 21, 1979), slip op. 6-7 (opinion of the court), 12-14 (Bennett, J., concurring and dissenting), in which the court likewise relied on its *Mitchell* decision in inferring an enforceable trust applicable to benefits paid to dependents of servicemen held as prisoners of war.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

KENT L. JONES
Assistant to the Solicitor General

ROBERT L. KLARQUIST
JOSHUA I. SCHWARTZ
Attorneys

MAY 1979

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

Nos. 772-71, 773-71, 774-71 and 775-71

(Decided January 24, 1979)

HELEN MITCHELL, ET AL.

v.

THE UNITED STATES

Before FRIEDMAN, *Chief Judge,* DAVIS, NICHOLS, KUNZIG, BENNETT and SMITH, *Judges, en banc.*

ON DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

DAVIS, *Judge,* delivered the opinion of the court:

These connected suits[1] by individual Indians and two Indian groups present claims for damages said to arise from the Government's management and disposition of the claimants' property. The principal plaintiffs are (1) 1465 individuals owning interests in Indian trust allotments on the Quinault Reservation in the State of Washington, and (2) the Quinault Tribe which now has about 4,000 acres on the

[1] There are four cases which have been consolidated.

Reservation.[2] The Reservation, consisting mainly of forest land, was established in 1873. Over a number of years, the Government, acting primarily under the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. §§ 331-358 (1976), allotted the whole Reservation in trust to individual Indians. About a third of the Reservation has by now gone out of trust, but a very substantial amount has remained in trust status.[3] The Government, through the Department of the Interior, has managed these tracts, selling the timber, handling the sale of individual allotments, and taking general care of the Indians' proceeds and monies from the tracts.

These suits accuse the defendant of various acts of mismanagement alleged to constitute breaches of trust for which the Government is liable in damages.[4]

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[2] Also a plaintiff is the Quinault Allottees Association, an unincorporated association to protect and promote the interests of Quinault Reservation allottees.

[3] For a history of the formation of the Reservation and of the allotment process, *see Quinault Allottee Ass'n* v. *United States*, 202 Ct. Cl. 625, 629-32, 485 F.2d 1391, 1393-95 (1973), *cert. denied*, 416 U.S. 961 (1974).

[4] In their brief, plaintiffs thus summarize their allegations against defendant:

(1) Failure to obtain fair market value for the allottees' timber when it was sold either under multiple-allotment, long-term contracts, individual allotment contracts, or land-and-timber sales;

(2) Failure to manage the timber sales and harvesting on the Reservation on a sustained yield basis and failure to rehabilitate the land after logging;

(3) Failure to obtain any payment at all for some of the allottees' merchantable timber;

Much was done in the cases after their filing in 1971 —discovery, considerable preparation of experts' studies, a partial trial of three weeks duration, plans for further trials—without any challenge to this court's subject-matter jurisdiction.[5] However, after the partial trial in 1977 the defendant belatedly filed a motion to dismiss for lack of jurisdiction; the ground was that all the mismanagement claims in these cases rest on the theory of a breach of trust by the defendant and that this court does not have jurisdiction of such breach of trust claims. This is the motion which is now before us and which we consider.[6] We reject the Government's position and

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(4) Failure to develop a proper road and easement system on the Reservation and allowing improper charges to be made to the allottees in connection therewith;

(5) Failure to pay interest on advance deposit and other funds to the allottees;

(6) Failure to obtain sufficient interest on Indian monies; and

(7) Excessive charges to the allottees for administrative fees.

[5] Nor was such a challenge made in the other Quinault cases, earlier considered, raising parallel issues. *Quinault Allottee Ass'n* v. *United States*, 197 Ct. Cl. 134, 453 F.2d 1272 (1972), 202 Ct. Cl. 625, 485 F.2d 1391 (1973) *cert. denied*, 416 U.S. 961 (1974); *Capoeman* v. *United States*, 194 Ct. Cl. 664, 440 F.2d 1002 (1971).

[6] Since the question posed by defendant's motion is jurisdictional, we entertain it despite the Government's failure to raise the point earlier in the litigation. *See* CT. CL. R. 38(h).

hold that the court properly has jurisdiction of these suits.[7]

I

Our authority to entertain the actions is invoked under 28 U.S.C. § 1491 (1976) (insofar as the suits are by individual Indians)[8] and 28 U.S.C. § 1505 (1976) (actions by or on behalf of Indian tribes, bands or groups).[9] Defendant's first jurisdictional objection is that claims based on breach of trust are judge-made elaborations, unconnected with the Constitution, statutes, treaties, regulations, executive orders, or contracts—and therefore outside the congressional consents-to-sue embodied in sections 1491 and 1505. We skip (without passing upon) the grant

[7] Aside from any effect of the statute of limitations, an issue which is not now before us and which we therefore do not even reach.

[8] 28 U.S.C. § 1491 provides in pertinent part: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

[9] 28 U.S.C. § 1505 provides: "The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

of jurisdiction over claims against the United States "for liquidated or unliquidated damages in cases not sounding in tort"[10] because here the Indians do not rest their case on unanchored judge-created principles of fiduciary law but point to and rely upon specific legislation as creating the trust relationship.

To sustain jurisdiction it is enough for us that the General Allotment Act, 25 U.S.C. §§ 331-358 (1976), governing the tracts involved in these cases, expressly declares the fiduciary connection. Section 5, 25 U.S.C. § 348, states that the allotment-patents "shall be of the legal effect, and declare that *the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in the case of his decease, of his heirs* * * * and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged *of said trust* and free of all charge or incumbrance whatsoever" (emphasis added). (The trust thus expressly established was extended first

[10] This phrase appears in section 1491 but, as the court has already pointed out, section 1505 covers the full ground of section 1491. *See Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 489-90 (1966).

Defendant repeats the old myth that this court has no jurisdiction over monetary claims harking back to equitable principles. We continue to reject that incorrect proposition. *See e.g., Quinault Allottee Ass'n* v. *United States*, 197 Ct. Cl. 134, 138 n.1, 453 F.2d 1272 (n. 1) (1972); *Pauley Petroleum, Inc.* v. *United States*, No. 197-69, slip op. at 11-13. (Ct. Cl. Jan. 24, 1979).

temporarily and then indefinitely by section 2 of the Indian Reorganization Act of 1934, 25 U.S.C. § 462 (1976).)[11]

The next question is whether this statute can ground the money claims asserted here for breach-of-trust. We do not hesitate to hold that the congressional declaration of trust in the General Allotment Act "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" because of a proven breach of trust. *See United States* v. *Testan,* 424 U.S. 392, 400, 402 (1976), citing *Eastport S.S. Corp.* v. *United States,* 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967). There is no requirement that Congress say expressly

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[11] Defendant suggests that the trust created by the General Allotment Act is solely to prevent improvident alienation of the tract by the Indian beneficiaries, and has no other incidence. But that is not what the statute says, nor is it the way in which the Act has been administered. The legislation states that the Government is to "hold" the allotted land "in trust *for the sole use and benefit of the Indian*" (emphasis added), thus indicating that the Government, as trustee, is to manage and conserve the property for the Indian, on a continuing basis, so long as the land remains in trust. And the Interior Department has regularly sought to fulfill that trust; it does not confine its oversight just to sales or outright transfers of the tract itself. *See Squire* v. *Capoeman,* 351 U.S. 1, 10 (1956). That is the nature of a trust allotment in which the United States has fee title and the Indian has only equitable title. *See Squire* v. *Capoeman,* 351 U.S. 1, 4 & n.5, 10 (1956). Somewhat different is a "restricted allotment" in which the Indian holds the fee but cannot convey it without governmental approval. That was the nature of the allotment in *United States* v. *Bowling,* 256 U.S. 484, 486-87 (1921).

that damages can be recovered for breach of the trust.[12] That conclusion is the necessary inference from the statute. It is inconceivable, for instance, that Indian allotment-patentees whose lands were wholly wasted by the Government could not recover compensation in this court for such a violation of fiduciary obligation. No other remedy would exist since there is no administrative channel for obtaining compensation, and prospective judicial relief by way of injunction or mandamus (assuming such a remedy exists at all) would be meaningless for damage already done.[13] The same is true of lesser breaches of trust, leading to monetary injury which is shown to have been incurred. If there is no remedy under 28 U.S.C. sections 1491 and 1505, there is in effect no real redress at all for a departure from the standards Congress imposed on the Government in the General Allotment Act. Such a result, urged on us by the Government, is not compelled by that

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[12] *Eastport* spelled out that such "fair" interpretation included rights to monetary recovery granted "expressly or by implication." *See* 178 Ct. Cl. at 605, 606, 372 F.2d at 1007, 1008.

[13] In contrast, in *United States* v. *Testan,* 424 U.S. 392 (1976), the Court considered that civil service employees improperly classified had prospective administrative remedies under the Classification Act, which were all that Congress provided or contemplated, especially in view of the "established rule" that "one is not entitled to the benefit of a position until he has been duly appointed to it." *See* 424 U.S. at 402, 403-04.

Act nor, in our view, would it be a correct interpretation. The trust language in the statute means that compensation can be recovered for a breach of trust provided that Congress has consented to suit on monetary claims, as it has in sections 1491 and 1505.

This is the stance we have consistently taken up to now in this kind of controversy. In *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 491-92 (1966), although we held that we could not order a general accounting at the outset, we emphasized at the same time that "[i]f, after a trial on the issue of liability, it is held that defendant has violated its *statutory fiduciary obligations*, it will be within the jurisdiction of the court to order the defendant in its capacity as a trustee to render an accounting for the purpose of enabling the court to determine the amount which plaintiffs are entitled to recover" (emphasis added), and that under sections 1491 and 1505 those Indian plaintiffs had "a forum for the recovery of any damages to which they are entitled because of the Government's mishandling of tribal funds and property. No special jurisdictional act is required to provide that relief." *See also* 174 Ct. Cl. at 490-91.

Similarly, in *Mason* v. *United States*, 198 Ct. Cl. 599, 617, 461 F.2d 1364, 1374 (1972), *rev'd* 412 U.S. 391 (1973), the court said: "A suit against the United States on behalf of the estate of a noncompetent Indian, for damages compensating the estate for breach by the Government of its trust obligation under a federal statute, is within 28 U.S.C.

§ 1491 as a claim founded upon an Act of Congress and for damages 'in cases not sounding in tort.' The Osage Allotment Act implies that, if the Government breaches its trust duty to the pecuniary disadvantage of a non-competent Osage allottee, due compensation will be paid by the United States" (citing *Eastport S.S. Corp.*, 178 Ct. Cl. 599, 372 F.2d 1002 (1967), among other decisions).[14]

There are also Indian cases in the same class which we have entertained with a somewhat briefer explanation of why we accepted jurisdiction. *See Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 345, 512 F.2d 1390, 1392 (1975); *Fields* v. *United States*, 191 Ct. Cl. 191, 196, 423 F.2d 380, 383 (1970); *Capoeman* v. *United States*, 194 Ct. Cl. 664, 666, 440 F.2d 1002, 1002 (1971); *Quinault Allottee Ass'n* v. *United States*, 202 Ct. Cl. 625, 628, 485 F.2d 1391, 1392 (1973), *cert. denied*, 416 U.S. 961 (1974); *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 134, 152-53, 550 F.2d 639, 639, 652-53 (1977).

Our continued acceptance of Indian claims for breach of trust—where the existence of the trust obligation is founded on a statute, treaty, executive order or regulation, or an agreement—comports fully with the expectation of Congress that that what is now 28 U.S.C. section 1505 (first enacted in 1946 as section 24 of the Indian Claims Commission Act, 60 Stat.

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[14] In reversing on the merits, the Supreme Court did not question this court's jurisdiction. *See United States* v. *Mason*, 412 U.S. 391, 394 & n.5 (1973).

1055) would cover the post-1946 "legal" claims (*i.e.* other than purely "moral" claims) of Indian entities "so that it will never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the future." 92 CONG. REC. 5313 (1946) (statement of then Congressman Jackson, committee chairman and principal sponsor of the Indian Claims Commission bill in the House of Representatives). *See Klamath & Modoc Tribes* v. *United States,* 174 Ct. Cl. 483, 488-89 (1966).[15] The report on the Indian Claims Commision bill made by the House Committee on Indian Affairs characterized the foreruner of section 1505 as giving the Indian "the same right as his white or black neighbor to secure a full and free hearing in the Court of Claims, or any other appropriate tribunal, *on any controversy with the Federal Government that may arise in the future.*" (emphasis added). H.R. REP. No. 1466, 79th Cong., 1st Sess. 3, *reprinted in* [1946] U.S. CODE CONG. & AD. NEWS 1347, 1349. Moreover, in statements which obviously blanketed both the past and the future, the report de-

[15] Congressman Jackson also said: "The Interior Department itself has suggested that it ought not to be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability" and "let us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed." 92 CONG. REC. 5312 (1946).

clared that: "If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States"; the report also observed that the Indians' inability at that time to obtain a day in court "on the one hand, encourages bureaucratic disregard of the rights of Indian citizens by a small minority of governmental officials who are comforted by the thought that there is no judicial redress available to the victims of their maladministration and, on the other hand, gives color to grievances which may assume tremendous proportions in the minds of the Indians where a full and fair trial would show that the grievance is wholly imaginary." H.R. REP. No. 1466, 79th Cong., 1st Sess. 5, *reprinted in* [1946] U.S. CODE CONG. & AD. NEWS 1347, 1351.

If we accepted defendant's current argument, these objectives, so plainly expressed when the predecessor of section 1505 was adopted in 1946, could not be fulfilled, or even advanced.[16] Congress would still have to do that which it did not want or expect to do in 1946—continue to pass special jurisdictional acts or from time to time to have to enlarge this court's general jurisdiction over Indian money claims. We are justified, therefore, in concluding that Congress,

[16] Breach of trust claims—founded on statute, treaty, executive order, regulation, or agreement—have formed a large segment of post-1946 Indian cases under sections 1491 and 1505, and were expected in 1946 to be perhaps the main grist of those mills.

when it passed section 1505, considered that Indian trust legislation, such as the General Allotment Act, supplies a proper foundation for Indian monetary suits in this court to recover compensation for proven breaches of those trusts.[17]

II

Because we hold that the General Allotment Act, in itself, sustains plaintiffs' right to pursue their breach of trust allegations, we do not have to consider whether claims could be founded, in the absence of a trust provision comparable to that in the Allotment Act, upon the other pieces of legislation and regulation invoked here by the Indians.[18] Plaintiffs put

[17] The views of the 1946 Congress are not controlling on the meaning and scope of the General Allotment Act which was passed in 1887, but it is helpful to have the explicit and authoritative understanding of the 1946 Congress which went deeply into the problem of redressing wrongs against Indians and provided judicial and quasi-judicial remedies. *See NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 & n.8 (1969); *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 90 (1958). Of course, the views of the 1946 Congress have greater impact on section 1505, which was first enacted by it.

[18] These statutes are: 25 U.S.C. §§ 406 and 407 (1976) (directions as to sale of timber); 25 U.S.C. § 466 (1976) (operation and management of Indian forestry units on sustained-yield principles); 25 U.S.C. § 413 (1976) (collection of reasonable fees for work done for Indians); 25 U.S.C. §§ 349 and 372 (1976) (issuance of fee patents to allottees or heirs found to be competent and capable of managing their affairs); 25 U.S.C. § 318a, 323-25 (1976) (concerning roads and rights of way); 25 U.S.C. § 162a (1976) (investment of

these forward as additional, independent sources of jurisdiction but we do not reach that contention. For the most part, all we need and do hold is that, in the instant cases, account should be taken of these other statutes in deciding whether the Government violated its obligations as trustee under the General Allotment Act. To the extent applicable, these additional statutes furnish statutory directives—substantive rules of conduct—which help to determine the obligations and undertakings of the Federal Government as such trustee. For the purposes of the present cases it is irrelevant whether these other statutes, by themselves, would also create a trust relationship if the General Allotment Act were inapplicable. At the least, the other legislative provisions on which plaintiffs rely can furnish congressional gauges of proper trustee conduct, once it has been established, as here, that the Government is a trustee. Defendant seems to believe that this court cannot review discretionary acts of government officials for arbitrariness or capriciousness—even if a trust relationship exists—but we have consistently done so in other areas and have applied the same principle in Indian breach of trust claims brought in this court. *See Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 345, 512 F.2d 1390, 1392 (1975).[19]

tribal and individual Indian funds). Regulations have also been issued under most of these statutes.

[19] Though we do not decide whether the statutes cited in note 18, *supra*, themselves create a trust relationship or other basis for jurisdiction, we do point out that there is undoubted

III

Defendant marshals a number of decisions in support of its argument that this court lacks jurisdiction over plaintiffs' monetary claims for breach of trust, but none of these citations is in point. In some, the court thought that there was no statute, treaty, agreement, regulation or order which could be read as establishing a trust relationship or as imposing trust obligations—unlike the provisions of the General Allotment Act applicable here. *See Gila River Pima-Maricopa Indian Community* v. *United States,* 135 Ct. Cl. 180, 187-89, 140 F. Supp. 776, 780-81 (1956); *Gila River Pima-Maricopa Indian Community* v. *United States,* 190 Ct. Cl. 790, 797-98, 427 F.d 1194, 1198, *cert. denied,* 400 U.S. 819 (1970); *Skokomish Indian Tribe* v. *France,* 269 F.2d 555, 560 (9th Cir. 1959); *Donahue* v. *Butz,* 363 F. Supp. 1316, 1320, 1323, 1324 (N.D. Cal. 1973).

In others of defendant's "precedents," there was no statute empowering the particular court to grant the type of redress sought against the Government—unlike 28 U.S.C. § 1491 and § 1505, authorizing monetary relief in this court for claims founded on a statute such as the General Allotment Act. *See Naganab* v. *Hitchcock,* 202 U.S. 473, 475-76 (1906); *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128, 141-43 (1972); *United States* v. *Eastman,* 118 F.2d 421, 423 (9th Cir.), *cert. denied,* 314 U.S. 635 (1941); *Harkins* v. *United States,* 375 F.2d 239, 240-42 (10th Cir. 1967); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe,* 370 F.2d 529, 531-32 (8th Cir. 1967); *Motah* v. *United States,* 402 F.2d 1, 2 (10th Cir. 1968); *Vicenti* v. *United States,* 470 F.2d 845, 847-48 (10th Cir. 1972), *cert. dismissed,* 414 U.S. 1057 (1973); *National Indian Youth Council* v. *Bruce,* 485 F.2d 97, 99 (10th Cir. 1973), *cert. denied,* 417 U.S. 920 (1974). Most of these holdings concerned affirmative, non-monetary remedies, and for that reason have little bearing on our topic of monetary relief. In all of this set of cases jurisdiction was sought to be laid under statutory provisions very different from section 1491 or section 1505 (or the District Court analogue to the Tucker Act, 28 U.S.C. § 1346(a)(2) (1976)). None of the decisions passed upon the scope of the latter consents-to-monetary-suits (or any statutes comparable to them).

The case in this court which defendant stresses is *United States* v. *Mescalero Apache Tribe,* 207 Ct. Cl. 369, 518 F.2d 1309 (1975), *cert. denied,* 425 U.S. 911 (1976). But that decision wholly revolved around the separate problem of the responsibility of the Gov-

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jurisdiction in this court, aside from any trust relationship under those statutes, over the claims in which plaintiffs seek to recover their own monies retained or deducted by the Government—unreasonable fees and service charges deducted for work performed by the defendant; improper deduction of road maintenance costs; and any other claims that the Government illegally kept some of the Indians' own money or property. *See Eastport S.S. Corp.* v. *United States,* 178 Ct. Cl. 599, 605-06, 372 F.2d 1002, 1007-08.

ernment for payment of interest, and the existence *vel non* of statutes authorizing such payment in the circumstances then before the court. That subject matter is a far cry from most (though not all) of the claims in the present cases.[20] Nor did *Mescalero Apache Tribe* purport to pass, either in holding or in dictum, upon the jurisdictional question of the power of this court to entertain, under 28 U.S.C. §§ 1491 and 1505, the breach of trust allegations made by present plaintiffs.[21]

The upshot of our review of the prior holdings in this and other courts—called to our attention or of which we are aware—is that none suggests or calls for a denial of jurisdiction over the present proceedings. As shown in Part I, *supra*, our own earlier decisions sustain our power to consider plaintiffs' claims of breach of trust on their merits. For the reasons already given, defendant's current presentation has not moved us to alter that position.

The motion to dismiss for lack of jurisdiction is denied and the cases are returned to the Trial Divi-

[20] With respect to interest, *Mescalero Apache Tribe* involved different statutes and periods of time from those with which the court was concerned in *Cheyenne-Arapaho Tribes* v. *United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975).

[21] *Mescalero Apache Tribe* came to this court on appeal from the Indian Claims Commission and was governed by the jurisdictional provisions bearing on the authority of that Commission under the Indian Claims Commission Act. *See* 207 Ct. Cl. at 378, 518 F.2d at 1314.

sion for further proceedings on the merits of the claims.[22]

NICHOLS, *Judge*, concurring:

I agree with and join in the court's decision except as specified. I add this concurrence largely because in *Navajo Tribe* v. *United States*, Nos. 69, 299, 353 (Ct. Cl. October 18, 1978), I expressed the view that the court was again taking entirely too lightly the doctrine of strict construction of the consent to be sued, that the dropping out of Indian moral claims from our jurisdiction if they accrued after August 13, 1946, was no small matter and could be decisive in our adjudication of many Indian suits, and referred to the instant *Mitchell* case, which I expected to be hearing soon, as an example where the change might make a difference. After full acquaintance with the briefs and listening to oral argument, I am convinced that the present claims are legal as distinguished from moral, in the sense of our jurisdictional constraints. The distinction between law and equity is now effectively abolished and an equitable claim is legal and within our jurisdiction, or at least not excluded merely because of being equitable in the historic sense, as a claim by a beneficiary against a trustee surely is. It is excluded only to the extent it demands other than money relief. If the United States declares itself by statute to be trustee of

[22] It goes almost without saying that we intimate no position on the merits which are not at all before us. *See also* note 7, *supra*.

another's property, it assumes in my view an obligation to respond monetarily, in an action not sounding in tort, for maladministration of the property that deprives the beneficiary of its value. The standards of *United States* v. *Testan,* 424 U.S. 392 (1976) and *Eastport Steamship Corp.* v. *United States,* 178 Ct. Cl. 599, 372 F.2d 1002 (1967) are met. The claim is founded on an Act of Congress. We are not to second guess the defendant's officials every time hindsight says they made mistakes, surely, but the precise standard of review remains to be determined.

Many have misunderstood the decision in *United States* v. *Jones,* 131 U.S. 1 (1889). It construed the newly passed Tucker Act (Act of March 3, 1887, 24 Stat. 505) which stated that the Court of Claims (concurrent with circuit and district courts respecting small claims) should have jurisdiction of "all claims" in specified categories "in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable." The plaintiff was suing for specific performance of a contract to sell land. The Court held, largely by reference to the provisions for payment of judgments, and out of inability to conceive this court telling the Executive Branch what to do, that the reference to equity extended the jurisdiction of this court to claims for money arising out of "equitable and maritime, as well as legal demands," p. 18, the issuance of money decrees as well as money judgments, but did not provide for other than money relief. An equity

court, in those days, might decree the payment of money, as a law court entered judgment. Thus clearly a suit in equity could have been brought here if its end as pursued was a money decree. Justices Miller and Field, dissenting, thought this even so gutted the statute, with which many since have agreed, but it did not deprive the "equity" language of all meaning. That would have been an unlikely thing for the Court of those days to do. The defendant in *United States* v. *Milliken Imprinting Co.,* 202 U.S. 168 (1906) made the same mistaken argument made here, that the Court of Claims had no equity jurisdiction, citing *Jones,* p. 169. The suit was to reform a contract and enforce it as reformed, which the Court of Claims had done, 40 Ct. Cl. 81 (1904). It held it had equity power to reform the contract. The Supreme Court affirmed (as to jurisdiction) through Mr. Justice Holmes, saying it was making "a fairly liberal interpretation of the Act," p. 173. The reference to courts of equity has now been removed by recodifiers from the Tucker Act, but this only reflects the end of courts of equity as separate institutions and has never been held to effect a reduction in the scope of the consent to be sued. Thus, if it will please the defendant, we can say the Indians here are suing, as they may, for a money decree instead of for a money judgment. Mr. Justice Holmes thought he was being liberal, and he would appear to have been somewhat out of sympathy with the doctrine of strict construction of the consent to be sued, but in this instance he was only using the loophole carefully left open by the majority

opinion in that nonpariel of strict construction decisions, *Jones* v. *United States, supra.*

I read our own decision in *Klamath and Modoc Tribes* v. *United States,* 174 Ct. Cl. 483, 488 (1966) as in accord with the foregoing, but categorizing a suit for an accounting as other than a claim for money. In the historical view, the decision may well be seen as an instance of very strict construction of the consent to be sued.

Defendant cites *United States* v. *King,* 395 U.S. 1, 2-3 (1969) and *United States* v. *Testan,* 424 U.S. at 398, 403-04, for the proposition that relief, even money relief, would "entail the use of equitable jurisdiction which Congress has not seen fit to confer upon the Court of Claims." Brief at 19. It is true that some language in those two decisions, taken out of context, supports defendant's argument, but the context shows the Court was referring to "equitable jurisdiction" in the sense of other than monetary relief. The citation of *United States* v. *Jones, supra,* in *King* at p. 3, shows that this is so. The modern Court, citing *Jones,* could not have overlooked that the *Jones* Court was interpreting a statute, the Tucker Act, that expressly conferred equitable jurisdiction, and nullified it only so far as construed to authorize other than monetary relief, reaffirming it within that limitation.

I should add that in concurring in the court's opinion, I do not include the propostion implied in the text for f.n. 13 and ff. In my view, the doctrine of strict construction of the consent to be sued is relaxed

little if at all by the fact, so far as it is the fact, that the claimant has no other remedy. No claimant can be said to be wholly without a remedy as long as Congress sits. Congress has always reserved, and still reserves, adjudication of many claims for itself, and historically, Indian claims have often been in that category. Statements by courts to palliate instances of strict construction as in *Klamath and Modoc, supra,* cannot alter that fundamental fact. The converse is true, that creation of a later remedy elsewhere may signal an intent to withdraw or revoke an earlier consent to be used here, as in *Matson Navigation Co.* v. *United States,* 284 U.S. 352 (1932) (admiralty claims). The *Testan* reasoning referred to in f.n. 13 is somewhat in that category. I deem the result here does not require that kind of analysis and is fully consistent with the doctrine of strict construction of the consent to be sued, whether or not the Indians have any other remedy under present law, short of Congress.

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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1756

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

HELEN MITCHELL, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR WRIT OF CERTIORARI FILED MAY 23, 1979
CERTIORARI GRANTED JUNE 18, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1756

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

HELEN MITCHELL, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

TABLE OF CONTENTS

COMPLETE DOCKET ENTRIES OF COURT OF CLAIMS IN DOCKET NO. 772-71

DATE	PROCEEDINGS
October 18, 1971	Petition filed.
Oct 18 1971	Filing fee of $10 paid by plaintiffs.
Oct 18 1971	Plaintiffs' motion to waive filing fees (in excess of $10.00) filed. Copies (2) to deft. GRANTED JAN 24 1972, see order.
Oct 18 1971	Plaintiffs' motion for order providing for giving of notice of this action; and for consolidation of hearing (with the motion in 102-71) filed. Copies (2) to deft. GRANTED JAN 24 1972, see order.
Oct 29 1971	See case No. 760-71 for court order referring case to Commissioner. vacated 12/18/72
Nov 3 1971	Defendant's motion for leave to file opposition to motion re notice filed. Copies (2) to atty. ALLOWED NOV 19 1971 and filed.
Nov 15 1971	Defendant's motion for more definite statement filed. Copies (2) to atty. ALLOWED NOV 30 1971.
Nov 19 1971	Defendant's opposition to plaintiffs' motion for order providing for the giving of notice of this action filed. Copies (2) to atty.
Dec 30 1971	Plaintiffs' more definite statement filed. Copies (13) to deft.
Jan 18 1972	Defendant's motion for extension of time (to March 16, 1972) to answer, etc. filed. Copies (2) to atty. ALLOWED FEB 1 1972.
Jan 24 1972	Court entered order (in this, 773-71, 774-71 and 775-71) granting motions for an order providing for giving of notice, granting plaintiffs motions to waive filing fees, returning each case to the trial commissioner

DATE	PROCEEDINGS

for further appropriate proceedings and denying without prejudice plaintiffs' motions to consolidate with Ct. Cl. No. 102-71 for oral argument, as set forth in the order. Copy to parties.

Mar 10 1972 Defendant's motion for extension of time (to May 15, 1972) to answer, etc. filed. Copies (2) to atty. ALLOWED MAR 21 1972.

May 9 1972 Defendant's motion for extension of time (to June 30, 1972) to answer, etc. filed. Copies (2) to atty. ALLOWED MAY 23 1972.

Jun 22 1972 Defendant's answer to the petition filed. Copies (13) to atty.

Sep 8 1972 Commissioner's standard pretrial order on liability filed. Copy to parties.

Dec 18 1972 Notice of reassignment of case to Commissioner filed. Copy to parties. vacated 5/2/75

Dec 29 1972 Plaintiff's motion for leave to file out of time filed (in this and related cases). Copies (2) to deft. ALLOWED JAN 10 1973.

Jan 10 1973 Plaintiffs' motion for extension of time (to March 8, 1973) to comply with pretrial order filed (in this and related cases). Copies (2) to deft. ALLOWED JAN 24 1973.

Mar 8 1973 Plaintiffs' motion for extension of time (90 days) to comply with pretrial order filed, (in this and related cases). Copies (2) to deft. ALLOWED MAR 20 1973.

Jun 1 1973 Plaintiffs' motion for extension of time (to September 4, 1973) to comply with pretrial order filed (in this and related cases). Copies (2) to deft. ALLOWED JUN 13 1973.

Aug 21 1973 Plaintiffs' motion for extension of time (to December 4, 1973) to comply with pretrial order filed (in this and related cases). Copies (2) to deft. ALLOWED SEP 4 1973.

DATE	PROCEEDINGS

Nov 16 1973 Defendant's motion for order directing plaintiffs to respond to attached written interrogatories filed, (in this and related cases). Copies (2) to atty. ALLOWED JAN 11 1974.

Dec 4 1973 Plaintiffs' motion for extension of time (to March 4, 1974) to comply with pretrial order filed. Copies (2) to deft. ALLOWED DEC 19 1973, see endorsement on motion.

Dec 17 1973 Plaintiffs' motion for extension of time (to December 24, 1973) to respond to motion re interrogatories filed. Copies (2) to deft. ALLOWED DEC 19 1973.

Dec 26 1973 Plaintiffs' motion for extension of time (to December 28, 1973) to respond to motion re interrogatories filed. Copies (2) to deft. ALLOWED DEC 28 1973.

Dec 28 1973 Plaintiffs' motion for protective order filed. Copies (2) to deft. DENIED JAN 11 1974 as premature.

Jan 15 1974 Plaintiff's motion for leave to take deposition upon oral examination filed. Copies (2) to deft. DENIED JAN 28 1974, without prejudice.

Mar 4 1974 Plaintiffs' motion for extension of time (to April 13, 1974) to comply with pretrial order filed. Copies (2) to deft. ALLOWED MAR 15 1974.

May 13 1974 Plaintiffs' motion to add additional plaintiffs filed. Copies (2) to deft. ALLOWED MAY 20 1974.

Jul 3 1974 Defendant's motion for leave to file out of time motion for extension of time to file pretrial submissions filed. Copies (2) to atty. (in this and 773-71, 774-71 and 775-71). ALLOWED JUL 8 1974.

Jul 8 1974 Defendant's motion for extension of time (to October 15, 1974) to comply with pretrial order filed (in this and 773-71, 774-71 and 775-71). Copies (2) to atty. ALLOWED JUL 9 1974.

Oct 23 1974 Defendant's motion for leave to file (for extension of time) out of time filed. Copies (2) to atty. (in this and related cases) ALLOWED OCT 30 1974.

DATE	PROCEEDINGS

Oct 30 1974 Defendant's motion for extension of time (to February 20, 1975) to comply with pretrial order filed (in this and related cases). Copies (2) to atty. ALLOWED OCT 30 1974.

Feb 28 1975 Defendant's motion for leave to file out of time (its motions for an extension of time) filed, (in this and related cases). Copies (2) to atty. ALLOWED MAR 11 1975.

Mar 11 1975 Defendant's motion for extension of time (to December 1, 1975) to file its pre-trial submissions filed (in this and related cases). Copies (2) to atty. ALLOWED MAR 11 1975, with no further extension to be granted except for extraordinary circumstances.

May 2 1975 Notice of reassignment of case to Trial Judge John P. Wiese filed. Copy to parties.

May 6 1975 Defendant's motion to define jurisdiction filed (in this and related cases). Copies (3) to atty. SEE WITHDRAWAL FILED MAY 21 1975.

May 14 1975 Plaintiffs' opposition to motion to motion to define jurisdiction filed. Copies (2) to deft. (in this and related cases).

May 14 1975 Plaintiffs' motion to add additional plaintiffs filed (in this and related cases). Copies (2) to deft. ALLOWED MAY 23 1975, see endorsement on motion.

May 21 1975 Defendant's response to motion to add additional plaintiffs filed (in this and related cases). Copies (2) to atty.

May 21 1975 Defendant's withdrawal of motion to define jurisdiction filed, (in this and related cases). Copies (2) to atty.

May 30 1975 Plaintiffs' reply to response to motion to add plaintiffs filed (BLOTJ), (in this and related cases). Copies (2) to deft.

Sep 10 1975 Plaintiffs' motion for leave to file depositions filed (in this and related cases). Copies (2) to deft. ALLOWED SEP 12 1975.

DATE	PROCEEDINGS

Sep 22 1975 Deposition upon oral examination of Lester C. McKeever together with exhibits A, B and C attached filed by defendant. Notice to parties. (in this and related cases).

Nov 10 1975 Depositions of Joseph M. Jackson (2 volumes), John B. Benedetto, Earl E. Allen, John W. Libby, Joseph E. Poitras, Perry Skarra (2 volumes) and Victor Meeker (2 volumes) filed by plaintiffs. Notice to parties.

Nov 25 1975 Joint motion for enlargements of time in which to file pretrial submissions (to January 15, 1976, etc.) filed by defendant, (in this and related cases). Copies (2) to atty. ALLOWED NOV 26 1975.

Jan 14 1976 Plaintiffs' motion for extension of time (to March 1, 1976) to comply with pretrial order filed (in this and related cases). Copies (2) to deft. ALLOWED JAN 16 1976.

Feb. 23 1976 Plaintiffs' motion to add additional plaintiffs filed (in this and related cases). Copies (2) to deft. ALLOWED MAR 2 1976.

Feb 26 1976 Defendant's response to motion to add additional plaintiffs filed. Copies (2) to atty.

Mar 1 1976 Plaintiffs' motion for extension of time (to March 22, 1976) to comply with pretrial order filed (in this and related cases). Copies (2) to deft. ALLOWED MAR 3 1976.

Apr 9 1976 Trial judge's memorandum of pretrial conference filed (in this and related cases). Copy to parties.

May 28 1976 Plaintiffs' motion to add additional plaintiffs filed (in this and related cases). Copies (2) to deft. ALLOWED JUN 8 1976.

Jun 1 1976 Plaintiffs' motion for extension of time (to June 8, 1976) to file their synopsis, etc. filed, (in this and related cases). Copies (2) to deft. ALLOWED JUN 2 1976.

DATE	PROCEEDINGS

Jul 13 1976 Defendant's motion for extension of time (of 120 days from July 20, 1976) to comply with pretrial order filed (in this and related cases). Copies (2) to atty. ALLOWED JUL 30, 1976, see endorsement on motion.

Jul 13 1976 Defendant's motion to require plaintiffs to submit reports and work sheets filed, (in this and related cases.) Copies (2) to atty. ALLOWED JUL 30 1976, see endorsement on motion.

Jul 16 1976 Plaintiffs' response to motions of July 13, 1976 filed (in this and related cases). Copies (2) to deft.

Sep 27 1976 Defendant's motion for leave to amend answer filed. Copies (2) to atty. ALLOWED OCT 13 1976.

Sep 28 1976 Plaintiffs' motion to add additional plaintiffs filed. Copies (2) to deft. (in this and related cases). ALLOWED OCT 14 1976.

Oct 6 1976 Plaintiffs' response to motion to amend answer filed (in this and related cases). Copies (2) to deft.

Oct 13 1976 Defendant's amended answer to first amended petition filed. Copies (5) to atty.

Oct 15 1976 Plaintiffs' motion for extension of time (to October 27, 1976) to file expert's report filed (in this and related cases). Copies (2) to deft. ALLOWED OCT 21 1976.

Nov 16 1976 Defendant's motion for extension of time (to March 17, 1977) to comply with pretrial order filed. (in this and related cases). Copies (2) to atty. ALLOWED NOV 24 1976.

Nov 29 1976 Plaintiffs' motion for authorization for service of subpoenas beyond 100 miles filed. Copies (2) to deft. (in this and related cases).

Dec 17 1976 Trial judge's order authorizing issuance of subpoenas beyond 100 miles filed. Copies to parties. (in this and related cases).

DATE	PROCEEDINGS

Jan 5 1977 Trial judge's order authorizing issuance of subpoena beyond 100 miles filed. Copy to parties. [in this and related cases]

Mar 9 1977 Defendant's motion for extension of time (to July 15, 1977) to comply with pretrial order filed (in this and related cases). Copies (2) to atty. MOOTED JUL 15 1977 by allowance of superceding motion of July 1, 1977.

Mar 8 1977 Transcript of testimony (14 volumes & a master index) taken at Seattle WA on various dates between January 20, 1977 and February 3, 1977 together with: Plaintiffs' exhibits BL-1 (9 volumes), BL-1A & B, BL-2 thru 9 (one Volume), BL-10 & 11, BL-13 thru 26, DT2.01 - 2.8-4.7 (one Volume), DT2.9-1 - 2.9-16 (one Volume), DT4.1-1 - 4.11-1.2 (one Volume), DT5.0-1 - 5.5-3 (one Volume), DT5.5-4 - 5.9-14 (one volume), DT6.2-31, DT 6.2.2-161, DT7.15.1-34.1, DT7.15.1-40.2, DT7.15.2-36.4, DT15.1-30.3, DT15.5-31, DT15.5-92.2, DT15.5-99.1, DT 15.5-113.1, DT15.25-4, DT16.5-23, DT19.9-27, JT-1, JT2 - 101 (one Volume), JT102 - 201 (one Volume), JT202 - 301 (one Volume), JT302 - 401 (one Volume), JT402 - 536 (one Volume), JT 537 - 686 (one Volume), JT687 - 841 (one Volume), JT842, JT843, JT844, JT845, VR-1, VR2A - VR57 (one Volume), VR58 - VR117 (one Volume), VR118A - VR121 (one Volume), W-1, W-1A, W-1B, defendant's exhibits A1 thru A131, filed. (in this and related cases). Notice to parties.

Mar 18 1977 Plaintiffs' reply to motion for time extension filed. Copies (2) to deft.

Apr 14 1977 Plaintiffs' motion for order directing defendant to respond to request for admissions filed (in this and related cases). Copies (2) to deft. MOOTED MAY 12 1977, see endorsement on motion.

May 10 1977 Defendant's objections to motion for order directing defendant to respond to request for admission filed. Copies (2) to atty. (in this and related cases).

DATE PROCEEDINGS

May 20 1977 Trial judge's memorandum of pretrial conference filed (in this and related cases). Copy to parties.

May 20 1977 Plaintiffs' motion to add additional plaintiffs filed (in this and related cases). Copies (2) to deft. ALLOWED JUN 3, 1977.

Jun 7 1977 Trial judge's memorandum of pretrial conference filed. Copy to parties. [in this and related cases]

Jul 1 1977 Defendant's motion for extension of time (to December 17, 1977) to comply with pretrial order filed, (in this and related cases). Copies (2) to atty. ALLOWED JUL 13, 1977.

Sep 30 1977 Defendant's motion to dismiss for lack of jurisdiction and supporting memorandum filed. Copies (5) to atty.

Oct 31 1977 Plaintiffs' motion for extension of time (to December 30, 1977) to respond to motion to dismiss filed (in this and related cases). Copies (2) to deft. ALLOWED NOV 4 1977, with no further extension to be granted except for extraordinary circumstances.

Nov 30 1977 Plaintiffs' motion to add additional plaintiffs filed (in this and related cases). Copies (2) to deft. ALLOWED DEC 15 1977.

Dec 7 1977 Defendant's motion for extension of time to comply with pretrial order filed (in this and related cases). Copies (2) to atty. ALLOWED DEC 22 1977.

Dec. 30 1977 Plaintiffs' response to defendant's motion to dismiss filed. Copies (5) to deft. (in this and related cases).

Jan 11 1978 Defendant's motion for extension of time (to March 2, 1978) to file its reply to plaintiff's response to defendant's motion to dismiss filed. Copies (2) to atty. ALLOWED JAN 27 1978.

Mar 2 1978 Defendant's motion for extension of time (to March 22, 1978) and for leave to file brief with excess pages filed (in this and related cases). Copies (2) to atty. ALLOWED MAR 17 1978.

DATE PROCEEDINGS

Mar 17 1978 Defendant's reply brief to plaintiffs' response to defendant's motion to dismiss filed. Copies (5) to atty.

Apr 6 1978 Submitted to the court on defendant's motion to dismiss petitions (in this and related cases). [JUN 13 1978: Returned for calendar]

Sep 21 1978 In this, and 775-71, court entered order that these cases will be heard by the court *en banc* on the October 1978, calendar. Copy to parties.

Oct 4 1978 This and 773-71 thru 775-71 argued and submitted on defendant's motion to dismiss petitions [Before Friedman, Davis, Nichols, Kunzig, Bennett, Smith En Banc].

Oct 18 1978 Plaintiffs' motion to add (8) additional plaintiffs filed. Copies (2) to deft. (in this, 773-71 thru 775-71. ALLOWED: NOV 2 1978.

Jan 24 1979 In this, 773-71, 774-71 and 775-71, defendant's motion to dismiss for lack of jurisdiction is denied, and the cases are returned to the Trial Division for further proceedings on the merits of the claims. Opinion by Judge Davis. Concurring opinion by Judge Nichols.

May 29 1979 In this, thru 775-71, notice of filing in the Supreme Court of the United States of a petition for writ of certiorari on May 23, 1979, No. 78-1756, October Term, 1978, filed.

RELEVANT DOCKET ENTRIES OF COURT OF CLAIMS IN DOCKET NO. 773-71

DATE	PROCEEDINGS
1971	
October 18	Petition filed.
1972	
June 22	Defendant's answer to the petition filed.
1976	
October 13	Defendant's amended answer to plaintiffs' first amended petition filed.

SEE CASE NO. 772-71 FOR FURTHER PROCEEDINGS.

RELEVANT DOCKET ENTRIES OF COURT OF CLAIMS IN DOCKET NO. 774-71

DATE	PROCEEDINGS
1971	
October 18	Petition filed.
1972	
June 22	Defendant's answer to petition filed.
1976	
October 13	Defendant's amended answer to first amended petition filed.

SEE CASE NO. 772-71 FOR FURTHER PROCEEDINGS.

RELEVANT DOCKET ENTRIES OF COURT OF CLAIMS IN DOCKET NO. 775-71

DATE	PROCEEDINGS

1971

October 18 Petition filed.

1972

June 14 Defendant's motion to dismiss filed. SEP. 29, 1972: referred to trial commissioner for appropriate action. ALSO SEE OCT. 2, 1972.

September 18 Plaintiffs' response to defendant's motion to dismiss filed.

September 18 Plaintiffs' motion for leave to file an amended petition filed. SEP. 29, 1972: motion referred to trial commissioner for appropriate action. OCT. 2, 1972: ALLOWED.

October 2 Re motion to dismiss filed June 14, 1972: motion moot in view of order this date on plaintiffs' motion to amend.

October 2 Plaintiff's first amended petition filed.

November 1 Defendant's motion to dismiss filed.

December 11 Plaintiffs' response to defendant's motion to dismiss filed.

December 27 Submitted to the court on defendant's motion to dismiss.

1973

February 2 Court entered order granting defendant's motion to dismiss and dismissing the petition to the extent as set forth in the order. The defendant's motion to dismiss is otherwise denied.

March 30 Defendant's answer to plaintiffs' first amended petition filed.

DATE	PROCEEDINGS

1976

October 13 Defendant's amended answer to first amended petition filed.

SEE CASE NO. 772-71 FOR FURTHER PROCEEDINGS.

IN THE UNITED STATES COURT OF CLAIMS

No. 772-71

HELEN MITCHELL, an allottee of the Quinault Reservation, and 530 other allottees listed on Attachment A hereto; the QUINAULT ALLOTTEES ASSOCIATION; and the QUINAULT TRIBE; on their own behalves and on behalf of ALL ALLOTTEES of the Quinault Reservation or their successors, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

PETITION

[Filed Oct. 18, 1971]

(Logging Contracts Claim)

This is an action to recover money damages from the defendant, arising from its management and disposition of the property of the plaintiffs. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1491 and 1505.

1. Plaintiff Helen Mitchell and the 530 other plaintiffs named in Attachment A hereto are Indians who received trust allotments on the Quinault Indian Reservation, Washington, or are the successors of such Indians. Plaintiffs are predominantly Quinault Indians, but also include Queets, Quileute, Hoh, Chehalis, Cowlitz, Chinook and other Indians.

2. The Quinault Allottees Association is an unincorporated association consisting of the allottees described in the preceding paragraph. The Association was formed in 1968 for the purpose of representing the interests of all of the allottees of the Quinault Reservation, or their successors. Plaintiffs know the names of some 1,450 of the original allottees or their successors, but there are many more names which plaintiffs do not know. The Association's governing body is the Quinault Allottees Committee, and Chairman of the Committee is plaintiff Helen Mitchell. The Secretary of the Interior has from

time to time recognized the Committee as representing all of the allottees of the Quinault Reservation.

3. The Quinault Tribe is an Indian Tribe, which has been in existence since time immemorial, and which has sovereignty over the Quinault Reservation. Its basic relationship with the defendant is established by the Treaty of Olympia, paragraph 5 below.

4. The class on whose behalf the plaintiffs sue consists of all allottees of the Quinault Reservation, or their successors, plus the Quinault Tribe in its capacity of owner of land and timber damaged by defendant's conduct as alleged herein. The class is so numerous that joinder of all members is impractical; the questions of law as to liability are common to the entire class; the claims and defenses of the plaintiffs are typical of the claims and defenses of the class; and the representative plaintiffs will fairly and adequately protect the interests of the class. Further, the prosecution of separate actions by individual members of the class would create a risk both of inconsistent and varying adjudications with respect to individual members of the class establishing incompatible judicial standards, and of prejudicing individual members of the class whose interests would be substantially impaired by the result in this suit. Further, the interests of those members of the class who are not named plaintiffs cannot as a practical matter be adjudicated with finality except through a class action. Further, the claims presented herein arise out of the management of the Quinault Forest, which the defendant managed in many respects as a single entity.

5. Under the Treaty of Olympia, 12 Stat. 971 (1859), the Quinault and Quileute Tribes ceded all their land in the country theretofore occupied by them on the Pacific coast of Washington. The Treaty provided that:

> "Article II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of lands sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their

exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian Affairs or Indian agent. . . .

"* * *

"ARTICLE VI. The President . . . may consolidate them with other friendly tribes or bands . . . and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

6. The sixth article of the Treaty with the Omahas, 10 Stat. 1043, 1044-5 (1854), referred to in the Quinault Treaty, provides as follows:

"ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. . . . No State legislature shall remove the restrictions herein provided for, without the consent of Congress."

The State of Washington was admitted into the Union in 1889, 25 Stat. 675. The state legislature has not removed the restrictions provided for in the above-quoted Article 6, nor has Congress consented to the removal of the restrictions.

7. On November 4, 1873, 1 Kapp. 923, President U.S. Grant by Executive Order established the Quinault Reservation with its present boundaries "for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast. . . ." Since 1874 the Quinault Indian Reservation has retained its outer boundaries without change. It comprises some 200,000 acres, including all of Lake Quinault and 20

miles of tidelands along the ocean, and was originally heavily forested throughout.

8. The Tribe remained the sole owner of the Reservation until about 1905. Then, pursuant to the above-quoted Treaty and Executive Order, the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331, and the Act of March 4, 1911, 36 Stat. 1345, defendant began to allot the Reservation to the members of the Tribe and other Indians. By 1933, the Reservation was completely allotted. There were over 2,300 allotments, typically 80 acres in size, and covered with valuable timber.

9. Each allottee received a deed, signed in the name of the President of the United States, containing language pursuant to Sec. 5 of the General Allotment Act, as amended, 25 U.S.C. § 348, that the United States will hold the allotment for the period of 25 years,

> ". . . in trust for the sole use and benefit of the Indian . . . or in case of his decease, of his heirs . . . and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . ."

The trust period of 25 years was extended from time to time, see 25 U.S.C. § 391, and then extended indefinitely by Sec. 2 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 462.

10. Pursuant to the Quinault Treaty, the Executive Order of 1873, the General Allotment Act of 1887, and the Act of March 4, 1911, the defendant has a fiduciary duty to the allottees to manage their lands and timber prudently, until the trust period ends. See also the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461 ff., especially § 466, directing the Secretary of the Interior to make regulations for the management of Indian forestry units on a sustained yield basis; and 41 Stat. 415 (1920), 25 U.S.C. § 413, authorizing the Secretary to collect fees for defendant's services. Defendant's duty is in part recognized and embodied in the Secretary's Forestry Regulations, 25 C.F.R. Part 141.

11. The Tribe owns a few small parcels of land, totalling about 4,000 acres, some as a result of restorations by Congress, see, *e.g.*, 73 Stat. 427 and 76 Stat. 913. All of the land and timber owned by the Tribe is held in trust by the defendant for the Tribe, and so long as the trust continues, the defendant has a fiduciary duty to manage such lands and timber prudently. This duty is recognized in 60 Stat. at 1055-6 (1946), Sec. 24; and see 25 U.S.C. § 466, directing the Secretary of the Interior to make regulations for the management of Indian forestry units on a sustained yield basis; and 25 U.S.C. § 413, authorizing the Secretary to collect fees for defendant's services. Defendant's duty is in part recognized and embodied in the Secretary's Forestry Regulations, 25 C.F.R. Part 141.

12. The Indian sovereignty over the Reservation lies in the Quinault Tribe. The membership of the Tribe consists of "blood members" (persons of at least one-quarter Quinault or Queets blood) and "affiliated" members (persons of at least one-quarter Quileute, Hoh, Chehalis, Chinook or Cowlitz blood who own a trust interest in an allotment on the Reservation, and who reside on or near the Reservation). Many allottees are blood or affiliated members of the Tribe. However, many other allotteees do not live on or within the required distance of the Reservation and so are ineligible to be members.

13. The allottees as such were totally unorganized until 1968. The Tribe has always been organized, but it could not, and did not, represent the allottees.

14. The typical allottee, for lack of education, experience and capacity to understand, relies completely on the defendant to manage his land and timber prudently, and to obtain the fair market price therefor when sold. The defendant is well aware of this reliance.

15. In 1916, after the Reservation was partially allotted, the defendant caused the timber on the Reservation to be inventoried, and logging began shortly after. The first long-term logging contract was let in 1920. By 1950, the southern half of the Reservation had been

logged or was in the process of being logged under long-term contracts. Still unlogged were the Queets, Taholah and Crane Creek Units, comprising about 45,000, 30,000 and 35,000 acres respectively, in the northern half of the Reservation.

16. Beginning around 1946, in order to arrange for the logging of these three remaining units, the defendant set about gathering powers of attorneys from the owners of allotments in the Queets, Taholah, and Crane Creek Units, authorizing the defendant to enter into long-term logging contracts. Many allottees were told or encouraged to believe that unless they signed the powers, their timber would be left out of the logging contracts, and the Secretary might not permit it to be logged in their lifetimes. The defendant's employees obtained signatures without adequate or accurate explanation of the facts and the alternatives available, and with misrepresentation, and with undue influence, Plaintiffs were incapable of making an intelligent decision whether to sign the powers, and signed only in reliance on defendant's representation that it would be in their best interests to do so.

17. Pursuant to the aforesaid powers of attorneys and to its powers as trustee of the plaintiffs' land, the defendant, acting through the Superintendent of the Taholah Indian Agency, entered into a contract with the Aloha Lumber Company on April 26, 1950, covering the Taholah Unit. Under this contract, Aloha purchased the timber on all allotments within the boundaries of the Taholah Unit and for which the Secretary had a power of attorney, and agreed to log it over the next 29 years. This contract will terminate in 1979.

18. The Crane Creek Unit contract was entered into with Rayonier, Inc., on June 18, 1952. It was in essential respects similar to the Taholah Unit contract, except that the term was 34 years, so that it will terminate in 1986.

19. The Queets Unit, comprising about 45,000 acres, was put up for bids, but no bids were received. Consequently, no long-term logging contract was let covering that unit, and logging since 1950 has been on an allotment-by-allotment basis. The defendant encouraged individual allottees in that unit to sell their land in fee,

and discouraged or prohibited sales of timber only, and as a consequence, only about 5,700 acres of trust allotments with merchantable timber still remain in the Queets Unit, the rest having been sold to non-Indians.

20. The various contracts which defendant arranged for the logging of the Quinault Forest failed adequately to protect the interests of the allottees and the Tribe. Furthermore, the contracts were administered by defendant in such a way as to fail adequately to protect the interests of the allottees and the Tribe. The arranging of the contracts and their administration were in breach of defendant's fiduciary duty to the allottees and the Tribe. As a result, the allottees and the Tribe failed to receive fair market value for their timber, were unnecessarily delayed and restricted in realizing proceeds from their timber, suffered loss of property without just compensation, and suffered other damages in connection with the contracts.

WHEREFORE, the plaintiffs are entitled to recover such damages as the proofs may show are proper and as their interests may appear, together with interest as such or as part of just compensation, and such other relief as this Court may deem proper.

Respectfully submitted,

CHARLES A. HOBBS
Attorney for Plaintiffs
1616 H Street, N.W.
Washington, D.C. 20006

WILKINSON, CRAGUN & BARKER
Jerry C. Straus
Charles H. Gibbs, Jr.
Of Counsel

(Note: Pursuant to an agreement between counsel, Attachment A to this Petition, listing the names of individual plaintiffs, has not been reproduced in this Appendix.)

IN THE UNITED STATES COURT OF CLAIMS

No. 772-71

HELEN MITCHELL, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

ANSWER

[Filed June 22, 1972]

First Defense

Petitioners fail to state a claim upon which relief can be granted.

Second Defense

Petitioners allegations are so vague and general that the petition fails to meet the requirements set out in Rule 35, and therefore, the petition fails to state a claim upon which relief can be granted.

Third Defense

The petition fails to state a claim within the jurisdiction of this Court as to those claims alleged to have accrued prior to October 18, 1965, as such claims are barred by limitations. 28 U.S.C. 2501.

Fourth Defense

The petition fails to state a claim within the jurisdiction of this Court as to those claims that accrued prior to August 13, 1946. 28 U.S.C. 1505.

Fifth Defense

The petition is defective for misjoinder of issues as the issues presented are not common to all the plaintiffs.

Sixth Defense

The petition is defective for misjoinder of parties.

Seventh Defense

For answer to the numbered paragraphs of the petition, defendant asserts that:

1. The allegations in the introductory paragraph are conclusions of law requiring no answer.
2. Defendant admits the allegations in paragraph 1.
3. Defendant admits the allegations in paragraph 2, except defendant admits in the last sentence of paragraph 2 that the committee has only been recognized as spokesman for the allottees and has not been recognized as the representative of the allottees.
4. The allegations in paragraph 3 are conclusions of law requiring no answer.
5. Defendant denies the allegations in paragraph 4. For further answer to paragraph 4, the defendant alleges that the only parties plaintiff are those named at the date of filing the petition or ~~those~~ individuals who subsequently enter pursuant to the Court's order providing for giving of notice of class action.
6. Defendant admits the allegations in paragraphs 5 and 6.
7. Defendant admits the allegations in paragraph 7.
8. Defendants admits the allegations in paragraph 8.
9. Defendant admits the allegations in paragraph 9.
10. The allegations in paragraph 10 as to the existence of a fiduciary duty and the alleged basis for such a duty are conclusions of law requiring no answer. Defendant does admit the existence of the various statutes and regulations cited.
11. Defendant admits the allegations in paragraph 11 that the Tribe owns a few parcels of land totalling about 4,000 acres, but the remainder of the allegations in paragraph 11 are conclusions of law requiring no answer.
12. Defendant admits the allegations in paragraph 12, except the first and last sentences are conclusions of law requiring no answer. Further, defendant is without knowledge or information sufficient to form a belief as to whether some of the "allottees do not live on or within

the required distance of the Reservation and so are ineligible to be members."

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

14. Defendant denies the allegations in paragraph 14.

15. Defendant admits the allegations in paragraph 15.

16. Defendant admits the allegation in paragraph 16 that the defendant obtained powers of attorney from the owners of allotments in the Queets, Taholah, and Crane Creek Units authorizing the defendant to enter into long term logging contracts, but defendant denies the remainder of the allegations in paragraph 16.

17. Defendant admits the allegations in paragraph 17.

18. Defendant admits the allegations in paragraph 18, except defendant denies that the contract was in "essential respects similar to the Taholah Unit Contract."

19. Defendant denies the allegations in paragraph 19, except defendant admits the allegations in the second sentence of paragraph 19.

20. Defendant denies the allegations in paragraph 20.

Respectfully submitted,

KENT FRIZZELL
Assistant Attorney General

HERMAN L. FUSSELL
Attorney, Department of Justice
Room 2138, Telephone 739-2741
Washington, D.C. 20530

Attorneys for Defendant

IN THE UNITED STATES COURT OF CLAIMS

No. 772-71

HELEN MITCHELL, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

AMENDED ANSWER TO PLAINTIFFS' FIRST AMENDED PETITION

[Filed Oct. 13, 1976]

The defendant, as an amendment to its Answer to Plaintiffs' Petition, and without waiving the defendant's contention that the plaintiffs have no right to a general accounting in Docket No. 775-71, alleges:

1. The defendant has, from time to time, expended various sums of money out of many appropriations on behalf of the plaintiff Indian tribe and on behalf of allottee plaintiffs and for the benefit of the plaintiff tribe and the allottee plaintiffs, to provide items and services and for varied purposes, the amount of which is unknown to the defendant at this time.

2. The answer will be further amended if it should be determined that the plaintiff tribe and the allottee plaintiffs are entitled to maintain this suit and that the defendant is liable to the plaintiff tribe and any of the allottee plaintiffs in any amount.

3. The answer will also be further amended when the amount of the above-referred to disbursements becomes known so that such amount may be set-off as gratuitous expenditures, as reimbursable expenditures incurred in the care of the forests on the Quinault Reservation, and as disbursements for the welfare of the plaintiff tribe and of the allottee plaintiffs, and in mitigation of damages, should any damages be awarded the plaintiffs herein.

4. Should the Court find any sum due in favor of the plaintiff tribe or the plaintiff allottees, said plaintiffs are not entitled to any interest thereon.

Respectfully submitted,

PETER R. TAFT
Assistant Attorney General

DAVID M. MARSHALL
Attorney
Attorneys for Defendant

By: ______________________
Attorney

IN THE UNITED STATES COURT OF CLAIMS

No. 773-71

HELEN MITCHELL, an allottee of the Quinault Reservation, and 530 other allottees listed on Attachment A hereto; the QUINAULT ALLOTTEES ASSOCIATION; and the QUINAULT TRIBE; on their own behalves and on behalf of ALL ALLOTTEES of the Quinault Reservation or their successors, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

PETITION

[Filed Oct. 18, 1971]

(Queets Unit Claim)

This is an action to recover money damages from the defendant, arising from its management and disposition of the property of the plaintiffs. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1491 and 1505.

1. Plaintiff Helen Mitchell and the 530 other plaintiffs named in Attachment A hereto are Indians who received trust allotments on the Quinault Indian Reservation, Washington, or are the successors of such Indians. Plaintiffs are predominantly Quinault Indians, but also include Queets, Quileute, Hoh, Chehalis, Cowlitz, Chinook and other Indians.

2. The Quinault Allottees Association is an unincorporated association consisting of the allottees described in the preceding paragraph. The Association was formed in 1968 for the purpose of representing the interests of all of the allottees of the Quinault Reservation, or their successors. Plaintiffs know the names of some 1,450 of the original allottees or their successors, but there are many more names which plaintiffs do not know. The Association's governing body is the Quinault Allottees Committee, and Chairman of the Committee is plaintiff

Helen Mitchell. The Secretary of the Interior has from time to time recognized the Committee as representing all of the allottees of the Quinault Reservation.

3. The Quinault Tribe is an Indian Tribe, which has been in existence since time immemorial, and which has sovereignty over the Quinault Reservation. Its basic relationship with the defendant is established by the Treaty of Olympia, paragraph 5 below.

4. The class on whose behalf the plaintiffs sue consists of all allottees of the Quinault Reservation, or their successors, plus the Quinault Tribe in its capacity of owner of land and timber damaged by defendant's conduct as alleged herein. The class is so numerous that joinder of all members is impractical; the questions of law as to liability are common to the entire class; the claims and defenses of the plaintiffs are typical of the claims and defenses of the class; and the representative plaintiffs will fairly and adequately protect the interests of the class. Further, the prosecution of separate actions by individual members of the class would create a risk both of inconsistent and varying adjudications with respect to individual members of the class establishing incompatible judicial standards, and of prejudicing individual members of the class whose interests would be substantially impaired by the result in this suit. Further, the interests of those members of the class who are not named plaintiffs cannot as a practical matter be adjudicated with finality except through a class action. Further, the claims presented herein arise out of the management of the Quinault Forest, which the defendant managed in many respects as a single entity.

5. Under the Treaty of Olympia, 12 Stat. 971 (1859), the Quinault and Quileute Tribes ceded all their land in the country theretofore occupied by them on the Pacific coast of Washington. The Treaty provided that:

> "Article II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of lands sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their

> exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian Affairs or Indian agent. . . .
>
> "* * *
>
> "ARTICLE VI. The President . . . may consolidate them with other friendly tribes or bands . . . and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

6. The sixth article of the Treaty with the Omahas, 10 Stat. 1043, 1044-5 (1854), referred to in the Quinault Treaty, provides as follows:

> "ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a Section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such

person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disclosed of as is provided for the disposition of the excess of said land. . . . No State legislature shall remove the restrictions herein provided for, without the consent of Congress."

The State of Washington was admitted into the Union in 1889, 25 Stat. 676. The state legislature has not removed the restrictions provided for in the above-quoted Article 6, nor has Congress consented to the removal of the restrictions.

7. On November 4, 1873, 1 Kapp. 923, President U. S. Grant by Executive Order established the Quinault Reservation with its present boundaries "for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast. . . ." Since 1874 the Quinault Indian Reservation has retained its outer boundaries without change. It comprises some 200,000 acres, including all of Lake Quinault and 20 miles of tidelands along the ocean, and was originally heavily forested throughout.

8. The Tribe remained the sole owner of the Reservation until about 1905. Then, pursuant to the above-quoted Treaty and Executive Order, the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331, and the Act of March 4, 1911, 36 Stat. 1345, defendant began to allot the Reservation to the members of the Tribe and other Indians. By 1933, the Reservation was completely allotted. There were over 2,300 allotments, typically 80 acres in size, and covered with valuable timber.

9. Each allottee received a deed, signed in the name of the President of the United States, containing language pursuant to Sec. 5 of the General Allotment Act, as amended, 25 U.S.C. § 348, that the United States will hold the allotment for the period of 25 years,

> ". . . in trust for the sole use and benefit of the Indian . . . or in case of his decease, of his heirs . . . and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . ."

The trust period of 25 years was extended from time to time, see 25 U.S.C. § 391, and then extended indefinitely by Sec. 2 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 462.

10. Pursuant to the Quinault Treaty, the Executive Order of 1873, the General Allotment Act of 1877, and the Act of March 4, 1911, the defendant has a fiduciary duty to the allottees to manage their lands and timber prudently, until the trust period ends. See also the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461 ff., especially § 466, directing the Secretary of the Interior to make regulations for the management of Indian forestry units on a sustained yield basis; and 41 Stat. 415 (1920), 25 U.S.C. § 413, authorizing the Secretary to collect fees for defendant's services. Defendant's duty is in part recognized and embodied in the Secretary's Forestry Regulations, 25 C.F.R. Part 141.

11. The Tribe owns a few small parcels of land, totalling about 4,000 acres, some as a result of restorations by Congress, see, *e.g.*, 73 Stat. 427 and 76 Stat. 913. All of the land and timber owned by the Tribe is held in trust by the defendant for the Tribe, and so long as the trust continues, the defendant has a fiduciary duty to manage such lands and timber prudently. This duty is recognized in 60 Stat. at 1055-6 (1946), Sec. 24; and see 25 U.S.C. § 466, directing the Secretary of the Interior to make regulations for the management of Indian forestry units on a sustained yield basis; and 25 U.S.C. § 413, authorizing the Secretary to collect fees for defendant's services. Defendant's duty is in part recognized and embodied in the Secretary's Forestry Regulations, 25 C.F.R. Part 141.

12. The Indian sovereignty over the Reservation lies in the Quinault Tribe. The membership of the Tribe consists of "blood members" (persons of at least one-quarter Quinault or Queets blood) and "affiliated" members (persons of at least one-quarter Quileute, Hoh, Chehalis, Chinook or Cowlitz blood who own a trust interest in an allotment on the Reservation, and who reside on or near the Reservation). Many allottees are blood or affiliated members of the Tribe. However, many other allottees do not live on or within the required distance of the Reservation and so are ineligible to be members.

13. The allottees as such were totally unorganized until 1968. The Tribe has always been organized, but it could not, and did not, represent the allottees.

14. The typical allottee, for lack of education, experience and capacity to understand, relies completely on the defendant to manage his land and timber prudently, and to obtain the fair market price therefor when sold. The defendant is well aware of this reliance.

15. In 1916, after the Reservation was partially allotted, the defendant caused the timber on the Reservation to be inventoried, and logging began shortly after. The first long-term logging contract was let in 1920. By 1950, the southern half of the Reservation had been logged or was in the process of being logged under long-

term contracts. Still unlogged were the Queets, Taholah and Crane Creek Units, comprising about 45,000, 30,000 and 35,000 acres respectively, in the northern half of the Reservation.

16. Beginning around 1946, in order to arrange for the logging of these three remaining units, the defendant set about gathering powers of attorneys from the owners of allotments in the Queets, Taholah, and Crane Creek Units, authorizing the defendant to enter into long-term logging contracts. Many allottees were told or encouraged to believe that unless they signed the powers, their timber would be left out of the logging contracts, and the Secretary might not permit it to be logged in their lifetimes. The defendant's employees obtained signatures without adequate or accurate explanation of the facts and the alternatives available, and with misrepresentation, and with undue influence. Plaintiffs were incapable of making an intelligent decision whether to sign the powers, and signed only in reliance on defendant's representation that it would be in their best interests to do so.

17. Pursuant to the aforesaid powers of attorneys and to its powers as trustee of the plaintiffs' land, the defendant, acting through the Superintendent of the Taholah Indian Agency, entered into a contract with the Aloha Lumber Company on April 26, 1950, covering the Taholah Unit. Under this contract, Aloha purchased the timber on all allotments within the boundaries of the Taholah Unit and for which the Secretary had a power of attorney, and agreed to log it over the next 29 years. This contract will terminate in 1979.

18. The Crane Creek Unit contract was entered into with Rayonier, Inc., on June 18, 1952. It was in essential respects similar to the Taholah Unit contract, except that the term was 34 years, so that it will terminate in 1986.

19. The Queets Unit, comprising about 45,000 acres, was put up for bids, but no bids were received. Consequently, no long-term logging contract was let covering that unit, and logging since 1950 has been on an allotment-by-allotment basis. The defendant encouraged individual allottees in that unit to sell their land in fee,

and discouraged or prohibited sales of timber only, and as a consequence, only about 5,700 acres of trust allotments with merchantable timber still remain in the Queets Unit, the rest having been sold to non-Indians.

20. The defendant's management of the Queets Unit, for example its failure to arrange for proper logging of the unit, its failure to insure a sound road system prior to allowing most of the land to go out of Indian ownership, its encouragement of land sales by Indians, its policies toward Indians who wanted to log their own allotments, were in breach of defendant's fiduciary duty to the allottees and the Tribe. The same allegations also apply to individual allotments located within areas under logging contracts but not subject to such contracts, and to other allotments. As a result, the allottees and the Tribe failed to receive fair market value for their land and timber, were unnecessarily delayed and restricted in realizing proceeds from their timber, suffered loss of property without just compensation, and were otherwise damaged. The Tribe was specially damaged in having a substantial part of its jurisdiction pass into non-Indian ownership.

WHEREFORE, the plaintiffs are entitled to recover such damages as the proofs may show are proper and as their interests may appear, together with interest as such or as part of just compensation, and such other relief as this Court may deem proper.

Respectfully submitted,

CHARLES A. HOBBS
Attorney for Plaintiffs
1616 H Street, N.W.
Washington, D.C. 20006

WILKINSON, CRAGUN & BARKER
Jerry C. Straus
Charles H. Gibbs, Jr.
Of Counsel

(Note: Pursuant to an agreement between counsel, Attachment A to this Petition, listing the names of individual plaintiffs, has not been reproduced in this Appendix.)

IN THE UNITED STATES COURT OF CLAIMS

No. 773-71

HELEN MITCHELL, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

ANSWER
[Filed June 22, 1972]

First Defense

Petitioners fail to state a claim upon which relief can be granted.

Second Defense

Petitioners allegations are so vague and general that the petition fails to meet the requirements set out in Rule 35, and therefore, the petition fails to state a claim upon which relief can be granted.

Third Defense

The petition fails to state a claim within the jurisdiction of this Court as to those claims alleged to have accrued prior to October 18, 1965, as such claims are barred by limitations. 28 U.S.C. 2501.

Fourth Defense

The petition fails to state a claim within the jurisdiction of this Court as to those claims that accrued prior to August 13, 1946. 28 U.S.C. 1505.

Fifth Defense

The petition is defective for misjoinder of issues as the issues presented are not common to all the plaintiffs.

Sixth Defense

The petition is defective for misjoinder of parties.

Seventh Defense

For answer to the numbered paragraphs of the petition, defendant asserts that:

1. The allegations in the introductory paragraph are conclusions of law requiring no answer.
2. Defendant admits the allegations in paragraph 1.
3. Defendant admits the allegations in paragraph 2, except defendant admits in the last sentence of paragraph 2 that the committee has only been recognized as spokesman for the allottees and has not been recognized as the representative of the allottees.
4. The allegations in paragraph 3 are conclusions of law requiring no answer.
5. Defendant denies the allegations in paragraph 4. For further answer to paragraph 4, the defendant alleges that the only parties plaintiff are those named at the date of filing the petition or those individuals who subsequently enter pursuant to the Court's order providing for giving of notice of class action.
6. Defendant admits the allegations in paragraph 5 and 6.
7. Defendant admits the allegations in paragraph 7.
8. Defendant admits the allegations in paragraph 8.
9. Defendant admits the allegations in paragraph 9.
10. The allegations in paragraph 10 as to the existence of a fiduciary duty and the alleged basis for such a duty are conclusions of law requiring no answer. Defendant does admit the existence of the various statutes and regulations cited.
11. Defendant admits the allegations in paragraph 11, that the Tribe owns a few parcels of land, totalling about 4,000 acres, but the remainder of the

allegations in paragraph 11 are conclusions of law requiring no answer.

12. Defendant admits the allegations in paragraph 12, except the first and last sentences are conclusions of law requiring no answer. Further, defendant is without knowledge or information sufficient to form a belief as to whether some of the "allottees do not live on or within the required distance of the Reservation and so are ineligible to be members."

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

14. Defendant denies the allegations in paragraph 14.

15. Defendant admits the allegations in paragraph 15.

16. Defendant admits the allegations in paragraph 16 that the defendant obtained powers of attorney from the owners of allotments in the Queets, Taholah, and Crane Creek Units, authorizing the defendant to enter into long term logging contracts, but defendant denies the remainder of the allegations in paragraph 16.

17. Defendant admits the allegations in paragraph 17.

18. Defendant admits the allegations in paragraph 18, except defendant denies that the contract was in "essential respects similar to the Taholah Unit Contract."

19. Defendant denies the allegations in paragraph 19, except defendant admits the allegations in the second sentence of paragraph 19.

20. Defendant denies the allegations in paragraph 20.

Respectfully submitted,

KENT FRIZZELL
Assistant Attorney General

HERMAN L. FUSSELL
Attorney, Department of Justice
Room 2138, Telephone 739-2741
Washington, D.C. 20530

Attorneys for Defendant

IN THE UNITED STATES COURT OF CLAIMS

No. 773-71

HELEN MITCHELL, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

AMENDED ANSWER TO PLAINTIFFS' FIRST AMENDED PETITION

[Filed Oct. 13, 1976]

The defendant, as an amendment to its Answer to Plaintiffs' Petition, and without waiving the defendant's contention that the plaintiffs have no right to a general accounting in Docket No. 775-71, alleges:

1. The defendant has, from time to time, expended various sums of money out of many appropriations on behalf of the plaintiff Indian tribe and on behalf of allottee plaintiffs and for the benefit of the plaintiff tribe and the allottee plaintiffs, to provide items and services and for various purposes, the amount of which is unknown to the defendant at this time.

2. The answer will be further amended if it should be determined that the plaintiff tribe and the allottee plaintiffs are entitled to maintain this suit and that the defendant is liable to the plaintiff tribe and any of the allottee plaintiffs in any amount.

3. The answer will also be further amended when the amount of the above-referred to disbursements becomes known so that such amount may be set-off as gratuitous expenditures, as reimbursable expenditures incurred in the care of the forests on the Quinault Reservation, and as disbursements for the welfare of the plaintiff tribe and of the allottee plaintiffs, and in mitigation of damages, should any damages be awarded the plaintiffs herein.

4. Should the Court find any sum due in favor of the plaintiff tribe or the plaintiff allottees, said plaintiffs are not entitled to any interest thereon.

Respectfully submitted,

PETER R. TAFT
Assistant Attorney General

DAVID M. MARSHALL
Attorney
Attorneys for Defendant

By: ______________________
Attorney

IN THE UNITED STATES COURT OF CLAIMS

No. 774-71

HELEN MITCHELL, an allottee of the Quinault Reservation, and 530 other allottees listed on Attachment A hereto; the QUINAULT ALLOTTEES ASSOCIATION; and the QUINAULT TRIBE; on their own behalves and on behalf of ALL ALLOTTEES of the Quinault Reservation or their successors, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

PETITION

[Filed Oct. 18, 1971]

(Reforestation Claim)

This is an action to recover money damages from the defendant, arising from its management and disposition of the property of the plaintiffs. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1491 and 1505.

1. Plaintiff Helen Mitchell and the 530 other plaintiffs named in Attachment A hereto are Indians who received trust allotments on the Quinault Indian Reservation, Washington, or are the successors of such Indians. Plaintiffs are predominantly Quinault Indians, but also include Queets, Quileute, Hoh, Chehalis, Cowlitz, Chinook and other Indians.

2. The Quinault Allottees Association is an unincorporated association consisting of the allottees described in the preceding paragraph. The Association was formed in 1968 for the purpose of representing the interests of all of the allottees of the Quinault Reservation, of their successors. Plaintiffs know the names of some 1,450 of the original allottees or their successors, but there are many more names which plaintiffs do not know. The Association's governing body is the Quinault Allottees

Committee, and Chairman of the Committee is plaintiff Helen Mitchell. The Secretary of the Interior has from time to time recognized the Committee as representing all of the allottees of the Quinault Reservation.

3. The Quinault Tribe is an Indian Tribe, which has been in existence since time immemorial, and which has sovereignty over the Quinault Reservation. Its basic relationship with the defendant is established by the Treaty of Olympia, paragraph 5 below.

4. The class on whose behalf the plaintiffs sue consists of all allottees of the Quinault Reservation, or their successors, plus the Quinault Tribe in its capacity of owner of land and timber damaged by defendant's conduct as alleged herein. The class is numerous that joinder of all members is impractical; the questions of law as to liability are common to the entire class; the claims and defenses of the plaintiffs are typical of the claims and defenses of the class; and the representative plaintiffs will fairly and adequately protect the interests of the class. Further, the prosecution of separate actions by individual members of the class would create a risk both of inconsistent and varying adjudications with respect to individual members of the class establishing incompatible judicial standards, and of prejudicing individual members of the class whose interests would be substantially impaired by the result in this suit. Further, the interests of those members of the class who are not named plaintiffs cannot as a practical matter be adjudicated with finality except through a class action. Further, the claims presented herein arise out of the management of the Quinault Forest, which the defendant managed in many respects as a single entity.

5. Under the Treaty of Olympia, 12 Stat. 971 (1859), the Quinault and Quileute Tribes ceded all their land in the country theretofore occupied by them on the Pacific coast of Washington. The Treaty provided that:

> "Article II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of lands sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and

hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian Affairs or Indian agent. . . .

"* * *

"ARTICLE VI. The President . . . may consolidate them with other friendly tribes or bands . . . and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

6. The sixth article of the Treaty with the Omahas, 10 Stat. 1043, 1044-5 (1854), referred to in the Quinault Treaty, provides as follows:

"ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. . . . No State legislature shall remove the restrictions herein provided for, without the consent of Congress."

The State of Washington was admitted into the Union in 1889, 25 Stat. 676. The state legislature has not removed the restrictions provided for in the above-quoted Article 6, nor has Congress consented to the removal of the restrictions.

7. On November 4, 1873, 1 Kapp. 923, President U. S. Grant by Executive Order established the Quinault Reservation with its present boundaries "for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast. . . ." Since 1874 the Quinault Indian Reservation has retained its outer boundaries without charge. It comprises some 200,000 acres, including all of Lake Quinault and 20 miles of

tidelands along the ocean, and was originally heavily forested throughout.

8. The Tribe remained the sole owner of the Reservation until about 1905. Then, pursuant to the above-quoted Treaty and Executive Order, the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331, and the Act of March 4, 1911, 36 Stat. 1345, defendant began to allot the Reservation to the members of the Tribe and other Indians. By 1933, the Reservation was completely allotted. There were over 2,300 allotments, typically 80 acres in size, and covered with valuable timber.

9. Each allottee received a deed, signed in the name of the President of the United States, containing language pursuant to Sec. 5 of the General Allotment Act, as amended, 25 U.S.C. § 348, that the United States will hold the allotment for the period of 25 years,

> ". . . in trust for the sole use and benefit of the Indian . . . or in case of his decease, of his heirs . . . and that the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . ."

The trust period of 25 years was extended from time to time, see 25 U.S.C. § 391, and then extended indefinitely by Sec. 2 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 462.

10. Pursuant to the Quinault Treaty, the Executive Order of 1873, the General Allotment Act of 1887, and the Act of March 4, 1911, the defendant has a fiduciary duty to the allottees to manage their lands and timber prudently, until the trust period ends. See also the Indian Reorganization Act of 1934, 48 Stat. 25 U.S.C. §§ 461 ff., especially § 466, directing the Secretary of the Interior to make regulations for the management of Indian forestry units on a sustained yield basis; and 41 Stat. 415 (1920), 25 U.S.C. § 413, authorizing the Secretary to collect fees for defendant's services. Defendant's duty is in part recognized and embodied in

the Secretary's Forestry Regulations, 25 C.F.R. Part 141.

11. The Tribe owns a few small parcels of land, totalling about 4,000 acres, some as a result of restorations by Congress, see, *e.g.*, 73 Stat. 427 and 76 Stat. 913. All of the land and timber owned by the Tribe is held in trust by the defendant for the Tribe, and so long as the trust continues, the defendant has a fiduciary duty to manage such lands and timber prudently. This duty is recognized in 60 Stat. at 1055-6 (1946), Sec. 24; and see 25 U.S.C. § 466, directing the Secretary of the Interior to make regulations for the management of Indian forestry units on a sustained yield basis; and 25 U.S.C. § 413, authorizing the Secretary to collect fees for defendant's services. Defendant's duty is in part recognized and embodied in the Secretary's Forestry Regulations, 25 C.F.R. Part 141.

12. The Indian sovereignty over the Reservation lies in the Quinault Tribe. The membership of the Tribe consists of "blood members" (persons of at least one-quarter Quinault or Queets blood) and "affiliated" members (persons of a least one-quarter Quileute, Hoh, Chehalis, Chinook or Cowlitz blood who own a trust interest in an allotment on the Reservation, and who reside on or near the Reservation). Many allottees are blood or affiliated members of the Tribe. However, many other allottees do not live on or within the required distance of the Reservation and so are ineligible to be members.

13. The allottees as such were totally unorganized until 1968. The Tribe has always been organized, but it could not, and did not, represent the allottees.

14. The typical allottee, for lack of education, experience and capacity to understand, relies completely on the defendant to manage his land and timber prudently, and to obtain the fair market price therefor when sold. The defendant is well aware of this reliance.

15. In 1916, after the Reservation was partially allotted, the defendant caused the timber on the Reservation to be inventoried, and logging began shortly after. The first long-term logging contract was let in 1920. By 1950, the southern half of the Reservation had been

logged or was in the process of being logged under long-term contracts. Still unlogged were the Queets, Taholah and Crane Creek Units, comprising about 45,000, 30,000 and 35,000 acres respectively, in the northern half of the Reservation.

16. Beginning around 1946, in order to arrange for the logging of these three remaining units, the defendant set about gathering powers of attorneys from the owners of allotments in the Queets, Taholah, and Crane Creek Units, authorizing the defendant to enter into long-term logging contracts. Many allottees were told or encouraged to believe that unless they signed the powers, their timber would be left out of the logging contracts, and the Secretary might not permit it to be logged in their lifetimes. The defendant's employees obtained signatures without adequate or accurate explanation of the facts and the alternatives available, and with misrepresentation, and with undue influence. Plaintiffs were incapable of making an intelligent decision whether to sign the powers, and signed only in reliance on defendant's representation that it would be in their best interests to do so.

17. Pursuant to the aforesaid powers of attorneys and to its powers as trustee of the plaintiffs' land, the defendant, acting through the Superintendent of the Taholah Indian Agency, entered into a contract with the Aloha Lumber Company on April 26, 1950, covering the Taholah Unit. Under this contract, Aloha purchased the timber on all allotments within the boundaries of the Taholah Unit and for which the Secretary had a power of attorney, and agreed to log it over the next 29 years. This contract will terminate in 1979.

18. The Crane Creek Unit contract was entered into with Rayonier, Inc., on June 18, 1952. It was in essential respects similar to the Taholah Unit contract, except that the term was 34 years, so that it will terminate in 1986.

19. The Queets Unit, comprising about 45,000 acres, was put up for bids, but no bids were received. Consequently, no long-term logging contract was let covering that unit, and logging since 1950 has been on an

allotment-by-allotment basis. The defendant encouraged individual allottees in that unit to sell their land in fee, and discouraged or prohibited sales of timber only, and as a consequence, only about 5,700 acres of trust allotments with merchantable timber still remain in the Queets Unit, the rest having been sold to non-Indians.

20. The defendant's management of the plaintiff's land, to the extent it failed to arrange for proper rehabilitation and reforestation of cutover land, and for proper care of growing timber, was in breach of its fiduciary duty to the allottees and the Tribe. As a result, the volume of timber owned by the allottees and the Tribe failed to increased from year to year at the rate it should; they suffered loss of property without just compensation, and were otherwise damaged.

WHEREFORE, the plaintiffs are entitled to recover such damages as the proofs may show are proper and as their interests may appear, together with interest as such or as part of just compensation, and such other relief as this Court may deem proper.

Respectfully submitted,

CHARLES A. HOBBS
Attorney for Plaintiffs
1616 H Street, N.W.
Washington, D.C. 20006

WILKINSON, CRAGUN & BARKER
Jerry C. Straus
Charles H. Gibbs, Jr.
Of Counsel

(Note: Pursuant to an agreement between counsel, Attachment A to this Petition, listing the names of individual plaintiffs, has not been reproduced in this Appendix.)

IN THE UNITED STATES COURT OF CLAIMS

No. 774-71

HELEN MITCHELL, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

ANSWER

[Filed June 22, 1972]

First Defense

Petitioners fail to state a claim upon which relief can be granted.

Second Defense

Petitioners allegations are so vague and general that the petition fails to meet the requirements set out in Rule 35, and therefore, the petition fails to state a claim upon which relief can be granted.

Third Defense

The petition fails to state a claim within the jurisdiction of this Court as to those claims alleged to have accrued prior to October 18, 1965, as such claims are barred by limitations. 28 U.S.C. 2501.

Fourth Defense

The petition fails to state a claim within the jurisdiction of this Court as to those claims that accrued prior to August 13, 1946. 28 U.S.C. 1505.

Fifth Defense

The petition is defective for misjoinder of issues as the issues presented are not common to all the plaintiffs.

Sixth Defense

The petition is defective for misjoinder of parties.

Seventh Defense

For answer to the numbered paragraphs of the petition, defendant asserts that:

1. The allegations in the introductory paragraph are conclusions of law requiring no answer.

2. Defendant admits the allegations in paragraph 1.

3. Defendant admits the allegations in paragraph 2, except defendant admits in the last sentence of paragraph 2 that the committee has only been recognized as spokesman for the allottees and has not been recognized as the representative of the allottees.

4. The allegations in paragraph 3 are conclusions of law requiring no answer.

5. Defendant denies the allegations in paragraph 4. For further answer to paragraph 4, the defendant alleges that the only parties plaintiff are those named at the date of filing the petition or those individuals who subsequently enter pursuant to the Court's order providing for giving of notice of class action.

6. Defendant admits the allegations in paragraph 5 and 6.

7. Defendant admits the allegations in paragraph 7.

8. Defendant admits the allegations in paragraph 8.

9. Defendant admits the allegations in paragraph 9.

10. The allegations in paragraph 10 as to the existence of a fiduciary duty and the alleged basis for such a duty are conclusions of law requiring no answer. Defendant does admit the existence of the various statutes and regulations cited.

11. Defendant admits the allegations in paragraph 11 that the Tribe owns a few small parcels of land, totalling about 4,000 acres, but the remainder of the allegations in paragraph 11 are conclusions of law requiring no answer.

12. Defendant admits the allegations in paragraph 12, except the first and last sentences are conclusions of law requiring no answer. Further, defendant is without knowledge or information sufficient to form a belief as to whether some of the "allottees do not live on or within the required distance of the Reservation and so are ineligible to be members."

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

14. Defendant denies the allegation in paragraph 14.

15. Defendant admits the allegations in paragraph 15.

16. Defendant admits the allegations in paragraph 16 that the defendant obtained powers of attorney from the owners of allotments in the Queets, Taholah, and Crane Creek Units, authorizing the defendant to enter into long term logging contracts, but defendant denies the remainder of the allegations in paragraph 16.

17. Defendant admits the allegations in paragraph 17.

18. Defendant admits the allegations in paragraph 18, exception defendant denies that the contract was in "essential respects similar to the Taholah Unit Contract."

19. Defendant denies the allegations in paragraph 19, except defendant admits the allegations in the second sentence of paragraph 19.

20. Defendant denies the allegations in paragraph 20.

Respectfully submitted,

KENT FRIZZELL
Assistant Attorney General

HERMAN L. FUSSELL
Attorney, Department of Justice
Room 2138, Telephone 739-2741
Washington, D.C. 20530

Attorneys for Defendant

IN THE UNITED STATES COURT OF CLAIMS

No. 774-71

HELEN MITCHELL, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

AMENDED ANSWER TO PLAINTIFFS' FIRST AMENDED PETITION

[Filed Oct. 13, 1976]

The defendant, as an amendment to its Answer to Plaintiffs' Petition, and without waiving the defendant's contention that the plaintiffs have no right to a general accounting in Docket No. 775-71, alleges:

1. The defendant has, from time to time, expended various sums of money out of many appropriations on behalf of the plaintiff Indian tribe and on behalf of allottee plaintiffs and for the benefit of the plaintiff tribe and the allottee plaintiffs, to provide items and services and for varied purposes, the amount of which is unknown to the defendant at this time.

2. The answer will be further amended if it should be determined that the plaintiff tribe and the allottee plaintiffs are entitled to maintain this suit and that the defendant is liable to the plaintiff tribe and any of the allottee plaintiffs in any amount.

3. The answer will also be further amended when the amount of the above-referred to disbursements becomes known so that such amount may be set-off as gratuitous expenditures, as reimbursable expenditures incurred in the care of the forests on the Quinault Reservation, and as disbursements for the welfare of the plaintiff tribe and of the allottee plaintiffs, and in mitigation of damages, should any damages be awarded the plaintiffs herein.

4. Should the Court find any sum due in favor of the plaintiff tribe or the plaintiff allottees, said plaintiffs are not entitled to any interest thereon.

Respectfully submitted,

PETER R. TAFT
Assistant Attorney General

DAVID M. MARSHALL
Attorney
Attorneys for Defendant

By: ______________________
Attorney

IN THE UNITED STATES COURT OF CLAIMS

No. 775-71

HELEN MITCHELL, an allottee of the Quinault Reservation, and 530 other allottees listed on Attachment A hereto; the QUINAULT ALLOTTEES ASSOCIATION; and the QUINAULT TRIBE; on their own behalves and on behalf of ALL ALLOTTEES of the Quinault Reservation or their successors, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

PETITION

[Filed Oct. 18, 1971]

(Accounting Claims)

This is an action to recover money damages from the defendant, arising from its management and disposition of the property of the plaintiffs. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1491 and 1505.

1. Plaintiff Helen Mitchell and the 530 other plaintiffs named in Attachment A hereto are Indians who received trust allotments on the Quinault Indian Reservation, Washington, or are the successors of such Indians. Plaintiffs are predominantly Quinault Indians, but also include Queets, Quileute, Hoh, Chehalis, Cowlitz, Chinook and other Indians.

2. The Quinault Allottees Association is an unincorporated association consisting of the allottees described in the preceding paragraph. The Association was formed in 1968 for the purpose of representing the interests of all of the allottees of the Quinault Reservation, or their successors. Plaintiffs know the names of some 1,450 of the original allottees or their successors, but there are many more names which plaintiffs do not know. The Association's governing body is the Quinault Allottees Committee, and Chairman of the Committee is plaintiff Helen Mitchell. The Secretary of the Interior has from

time to time recognized the Committee as representing all of the allottees of the Quinault Reservation.

3. The Quinault Tribe is an Indian Tribe, which has been in existence since time immemorial, and which has sovereignty over the Quinault Reservation. Its basic relationship with the defendant is established by the Treaty of Olympia, paragraph 5 below.

4. The class on whose behalf the plaintiffs sue consists of all allottees of the Quinault Reservation, or their successors, plus the Quinault Tribe in its capacity of owner of land and timber damaged by defendant's conduct as alleged herein. The class is so numerous that joinder of all members is impractical; the questions of law as to liability are common to the entire class; the claims and defenses of the plaintiffs are typical of the claims and defenses of the class; and the representative plaintiffs will fairly and adequately protect the interests of the class. Further, the prosecution of separate actions taken by individual members of the class would create a risk both of inconsistent and varying adjudications with respect to individual members of the class establishing incompatible judicial standards, and of prejudicing individual members of the class whose interests would be substantially impaired by the result in this suit. Further, the interests of those members of the class who are not named plaintiffs cannot as a practical matter be adjudicated with finality except through a class action. Further, the claims presented herein arise out of the management of the Quinault Forest, which the defendant managed in many respects as a single entity.

5. Under the Treaty of Olympia, 12 Stat. 971 (1859), the Quinault and Quileute Tribes ceded all their land in the country theretofore occupied by them on the Pacific coast of Washington. The Treaty provided that:

> "Article II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of lands sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian Affairs agent. . . .
>
> "* * *
>
> "ARTICLE VI. The President . . . may consolidate them with other friendly tribes or bands . . . and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

6. The sixth article of the Treaty with the Omahas, 10 Stat. 1043, 1044-5 (1854), referred to in the Quinault Treaty, provides as follows:

> "ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possesion and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on

> the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. . . . No State legislature shall remove the restrictions herein provided for, without the consent of Congress."

The State of Washington was admitted into the Union in 1889, 25 Stat. 676. The state legislature has not removed the restrictions provided for in the above-quoted Article 6, nor has Congress consented to the removal of the restrictions.

7. On November 4, 1873, 1 Kapp. 923, President U. S. Grant by Executive Order established the Quinault Reservation with its present boundaries "for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast. . . ." Since 1874 the Quinault Indian Reservation has retained its outer boundaries without change. It comprises some 200,000 acres, including all of Lake Quinault and 20 miles of tidelands along the ocean, and was originally heavily forested throughout.

8. The Tribe remained the sole owner of the Reservation until about 1905. Then, pursuant to the above-quoted Treaty and Executive Order, the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331, and the Act of March 4, 1911, 36 Stat. 1345, defendant began to allot the Reservation to the members of the Tribe and other Indians. By 1933, the Reservation was completely allotted. There were over 2,300 allotments, typically 80 acres in size, and covered with valuable timber.

9. Each allottee received a deed, signed in the name of the President of the United States, containing language pursuant to Sec. 5 of the General Allotment Act, as amended, 25 U.S.C. § 348, that the United States will hold the allotment for the period of 25 years,

> ". . . in trust for the sole use and benefit of the Indian . . . or in case of his decease, of his heirs . . . and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . ."

The trust period of 25 years was extended from time to time, see 25 U.S.C. § 391, and then extended indefinitely by Sec. 2 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 462.

10. Pursuant to the Quinault Treaty, the Executive Order of 1873, the General Allotment Act of 1887, and the Act of March 4, 1911, the defendant has a fiduciary duty to the allottees to manage their lands and timber prudently, until the trust period ends. See also the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461 ff., especially § 466, directing the Secretary of the Interior to make regulations for the management of Indian forestry units on a sustained yield basis; and 41 Stat. 415 (1920), 25 U.S.C. § 413, authorizing the Secretary to collect fees for defendant's services. Defendant's duty is in part recognized and embodied in the Secretary's Forestry Regulations, 25 C.F.R. Part 141.

11. The Tribe owns a few small parcels of land, totalling about 4,000 acres, some as a result of restorations

by Congress, see, *e.e.*, 73 Stat. 427 and 76 Stat. 913. All of the land and timber owned by the Tribe is held in trust by the defendant for the Tribe, and so long as the trust continues, the defendant has a fiduciary duty to manage such lands and timber prudently. This duty is recognized in 60 Stat. at 1055-6 (1946), Sec. 24; and see 25 U.S.C. § 466, directing the Secretary of the Interior to make regulations for the management of Indian forestry units on a sustained yield basis; and 25 U.S.C. § 413, authorizing the Secretary to collect fees for defendant's services. Defendant's duty is in part recognized and embodied in the Secretary's Forestry Regulations, 25 C.F.R. Part 141.

12. The Indian sovereignty over the Reservation lies in the Quinault Tribe. The membership of the Tribe consists of "blood members" (persons of at least one-quarter Quinault or Queets blood) and "affiliated" members (persons of at least one-quarter Quileute, Hoh, Chehalis, Chinook or Cowlitz blood who own a trust interest in an allotment on the Reservation, and who reside on or near the Reservation). Many allottees are blood or affiliated members of the Tribe. However, many other allottees do not live on or within the required distance of the Reservation and so are ineligible to be members.

13. The allottees as such were totally unorganized until 1968. The Tribe has always been organized, but it could not, and did not, represent the allottees.

14. The typical allottee, for lack of education, experienced and capacity to understand, relies completely on the defendant to manage his land and timber prudently, and to obtain the fair market price therefor when sold. The defendant is well aware of this reliance.

15. In 1916, after the Reservation was partially allotted, the defendant caused the timber on the Reservation to be inventoried, and logging began shortly after. The first long-term logging contract was let in 1920. By 1950, the southern half of the Reservation had been logged or was in the process of being logged under long-term contracts. Still unlogged were the Queets, Taholah and Crane Creek Units, comprising about 45,000, 30,000

and 35,000 acres respectively, in the northern half of the Reservation.

16. Beginning around 1946, in order to arrange for the logging of these three remaining units, the defendant set about gathering powers of attorneys from the owners of allotments in the Queets, Taholah, and Crane Creek Units, authorizing the defendant to enter into long-term logging contracts. Many allottees were told or encouraged to believe that unless they signed the powers, their timber would be left out of the logging contracts, and the Secretary might not permit it to be logged in their lifetimes. The defendant's employees obtained signatures without adequate or accurate explanation of the facts and the alternatives available, and with misrepresentation, and with undue influence. Plaintiffs were incapable of making an intelligent decision whether to sign the powers, and signed only in reliance on defendant's representation that it would be in their best interests to do so.

17. Pursuant to the aforesaid powers of attorneys and to its powers as trustee of the plaintiffs' land, the defendant, acting through the Superintendent of the Taholah Indian Agency, entered into a contract with the Aloha Lumber Company on April 26, 1950, covering the Taholah Unit. Under this contract, Aloha purchased the timber on all allotments within the boundaries of the Taholah Unit and for which the Secretary had a power of attorney, and agreed to log it over the next 29 years. This contract will terminate in 1979.

18. The Crane Creek Unit contract was entered into with Rayonier, Inc., on June 18, 1952. It was in essential respects similar to the Taholah Unit contract, except that the term was 34 years, so that it will terminate in 1986.

19. The Queets Unit, comprising about 45,000 acres, was put up for bids, but no bids were received. Consequently, no long-term logging contract was let covering that unit, and logging since 1950 has been on an allotment-by-allotment basis. The defendant encouraged individual allottees in that unit to sell their land in fee, and discouraged or prohibited sales of timber only, and

as a consequence, only about 5,700 acres of trust allotments with merchantable timber still remain in the Queets Unit, the rest having been sold to non-Indians.

20. The Act of February 14, 1920, 41 Stat. 415, 25 U.S.C. § 413, provides as follows:

> "The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of revenue: *Provided*, That the amounts so collected shall be covered into the Treasury as miscellaneous receipts, except when the expenses of the work are paid from Indian tribal funds, in which event they shall be credited to such funds."

The Secretary's regulations, 25 C.F.R. § 141.18, provide:

> "In sales of timber from either allotted or unalloted lands, a reasonable deduction shall be made from the gross proceeds to cover in whole or in part the cost of managing and protecting the forest lands, including the cost of timber sale administration, but not including the costs that are paid from funds appropriated specifically for fire suppression or forest pest control. Unless special instructions have been given by the Secretary as to the amount of the deduction or the manner in which it is to be made, there shall be deducted 10 percent of the gross amount received for timber sold under regular supervision, and 5 percent when the timber is sold in such a manner that little administrative expense by the Indian Bureau is required. Service fees in lieu of administrative deductions shall be determined in a similar manner."

21. Since February 14, 1920, whenever a sale of timber from trust allotments or tribal trust land on the Quinault Reservation has taken place, the Secretary has collected from the proceeds of sale an administrative

charge. Currently the charge is 10%, except where an Indian arranges for sale of his own timber, in which case the charge is currently 5%.

COUNT I

22. Over the years since 1920, defendant has received many payments from non-Indians for the purchase of plaintiffs' land and timber, and has never furnished a money accounting of the said payments. Pursuant to the fiduciary duty alleged in paragraphs 10 and 11 above, plaintiffs are entitled to such an accounting.

COUNT II

23. The amounts collected by the defendant from sales of plaintiffs' timber have greatly exceeded defendant's properly allocated costs, and the excess should be refunded to the plaintiffs. Plaintiffs are entitled to an accounting of the fees collected by defendant, and of the administrative costs claimed by defendant to be properly allocated thereto.

24. Pursuant to Rule 35(b), plaintiffs state that no action on this claim has been taken by Congress or by any other body. In Docket No. 524-69 Horton Capoeman, a Quinault allottee, claimed refund of the administrative charges, but his case was disposed of on the statute of limitations, without reaching the merits. See Opinion, April 16, 1971. Another petition making the same claim was filed in March, 1971, Docket No. 102-71, on behalf of the same class as herein. It is still pending.

WHEREFORE, plaintiffs demand the accountings described in Counts I and II.

Respectfully submitted,

CHARLES A. HOBBS
Attorney for Plaintiffs
1616 H Street, N.W.
Washington, D.C. 20006

WILKINSON, CRAGUN & BARKER
Jerry C. Straus
Charles H. Gibbs, Jr.
Of Counsel

(Note: Pursuant to an agreement between counsel, Attachment A to this Petition, listing the names of individual plaintiffs, has not been reproduced in this Appendix.)

IN THE UNITED STATES COURT OF CLAIMS

Docket No. 775-71

HELEN MITCHELL, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

FIRST AMENDED PETITION

[Filed Oct. 2, 1972]

(Accounting Claims)

This is an action to recover money damages from the defendant, arising from its management and disposition of the property of the plaintiffs. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1491 and 1505.

1. Plaintiff Helen Mitchell and the 530 other plaintiffs named in Attachment A hereto are Indians who received trust allotments on the Quinault Indian Reservation, Washington, or are the successors of such Indians. Plaintiffs are predominantly Quinault Indians, but also include Queets, Quileute, Hoh, Chehalis, Cowlitz, Chinook and other Indians.

2. The Quinault Allottees Association is an unincorporated association consisting of the allottees described in the preceding paragraph. The Association was formed in 1968 for the purpose of representing the interests of all of the allottees of the Quinault Reservation, or their successors. Plaintiffs know the names of some 1,450 of the original allottees or their successors, but there are many more names which plaintiffs do not know. The Association's governing body is the Quinault Allottees Committee, and Chairman of the Committee is plaintiff Helen Mitchell. The Secretary of the Interior has from time to time recognized the Committee as representing all of the allottees of the Quinault Reservation.

3. The Quinault Tribe is an Indian Tribe, which has been in existence since time immemorial, and which has

sovereignty over the Quinault Reservation. Its basic relationship with the defendant is established by the Treaty of Olympia, paragraph 5 below.

4. The class on whose behalf the plaintiffs sue consists of all allottees of the Quinault Reservation, or their successors, plus the Quinault Tribe in its capacity of owner of land and timber damaged by defendant's conduct as alleged herein. The class is so numerous that joinder of all members is impractical; the questions of law as to liability are common to the entire class; the claims and defenses of the plaintiffs are typical of the claims and defenses of the class; and the representative plaintiffs will fairly and adequately protect the interests of the class. Further, the prosecution of separate actions by individual members of the class would create a risk both of inconsistent and varying adjudications with respect to individual members of the class establishing incompatible judicial standards, and of prejudicing individual members of the class whose interests would be substantially impaired by the result in this suit. Further, the interests of those members of the class who are not named plaintiffs cannot as a practical matter be adjudicated with finality except through a class astion. Further, the claims presented herein arose out of the management of the Quinault Forest, which the defendant managed in many respects as a single entity.

5. Under the Treaty of Olympia, 12 Stat. 971 (1859), the Quinault and Quileute Tribes ceded all their land in the country theretofore occupied by them on the Pacific coast of Washington. The Treaty provided that:

> "Article II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of lands sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian Affairs or Indian agent. . . .
>
> * * * *

> "ARTICLE VI. The President . . . may consolidate them with other friendly tribes or bands . . . and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

6. The sixth article of the Treaty with the Omahas, 10 Stat. 1043, 1044-5 (1854), referred to in the Quinault Treaty, provides as follows:

> "ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section/ to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased

for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. . . . No State legislature shall remove the restrictions herein provided for, without the consent of Congress."

The State of Washington was admitted into the Union in 1889, 25 Stat. 676. The state legislature has not removed the restrictions provided for in the above-quoted Article 6, nor has Congress consented to the removal of the restrictions.

7. On November 4, 1873, 1 Kapp. 923, President U. S. Grant by Executive Order established the Quinault Reservation with its present boundaries "for the use of the Quinault, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast. . . ." Since 1874 the Quinault Indian Reservation has retained its outer boundaries without change. It comprises some 200,000 acres, including all of Lake Quinault and 20 miles of tidelands along the ocean, and was originally heavily forested throughout.

8. The Tribe remained the sole owner of the Reservation until about 1905. Then, pursuant to the above-quoted Treaty and Executive Order, the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331, and

the Act of March 4, 1911, 36 Stat. 1345, defendant begant to allot the Reservation to the members of the Tribe and other Indians. By 1933, the Reservation was completely allotted. There were over 2,300 allotments, typically 80 acres in size, and covered with valuable timber.

9. Each allotttee received a deed, signed in the name of the President of the United States, containing language pursuant to Sec. 5 of the General Allotment Act, as amended, 25 U.S.C. § 348, that the United States will hold the allotment for the period of 25 years,

> ". . . in trust for the sole use and benefit of the Indian . . . or in case of his decease, of his heirs . . . and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. . . ."

The trust period of 25 years was extended from time to time, see 25 U.S.C. § 391, and then extended indefinitely by Sec. 2 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 462.

10. Pursuant to the Quinault Treaty, the Executive Order of 1873, the General Allotment Act of 1887, and the Act of March 4, 1911, the defendant has a fiduciary duty to the allottees to manage their lands and timber prudently, until the trust period ends. See also the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461 ff., especially § 466, directing the Secretary of the Interior to make regulations for the management of Indian forestry units on a sustained yield basis; and 41 Stat. 415 (1920), 25 U.S.C. § 413, authorizing the Secretary to collect fees for defendant's services. Defendant's duty is in part recognized and embodied in the Secretary's Forestry Regulations, 25 C.F.R. Part 141.

11. The Tribe owns a few small parcels of land, totalling about 4,000 acres, some as a result of restorations by Congress, see, *e.g.*, 73 Stat. 427 and 76 Stat. 913. All of the land and timber owned by the Tribe is held in trust by the defendant for the Tribe, and so long as the

trust continues, the defendant has a fiduciary duty to manage such lands and timber prudently. This duty is recognized in 60 Stat. at 1055-6 (1946), Sec. 24; and see 25 U.S.C. § 466, directing the Secretary of the Interior to make regulations for the management of Indian forestry units on a sustained yield basis; and 25 U.S.C. § 413, authorizing the Secretary to collect fees for defendant's services. Defendant's duty is in part recognized and embodied in the Secretary's Forestry Regulations, 25 C.F.R. Part 141.

12. The Indian sovereignty over the Reservation lies in the Quinault Tribe. The membership of the Tribe consists of "blood members" (persons of at least one-quarter Quinault or Queets blood) and "affiliated" members (persons of at least one-quarter Quileute, Hoh, Chehalis, Chinook or Cowlitz blood who own a trust interest in an allotment on the Reservation, and who reside on or near the Reservation). Many allottees are blood or affiliated members of the Tribe. However, many other allottees do not live on or within the required distance of the Reservation and so are ineligible to be members.

13. The allottees as such were totally unorganized until 1968. The Tribe has always been organized, but it could not, and did not, represent the allottees.

14. The typical allottee, for lack of education, experience and capacity to understand, relies completely on the defendant to manage this land and timber prudently, and to obtain the fair market price therefor when sold. The defendant is well aware of this reliance.

15. In 1916, after the Reservation was partially allotted, the defendant caused the timber on the Reservation to be inventoried, and logging began shortly after. The first long-term logging contract was let in 1920. By 1950, the southern half of the Reservation had been logged or was in the process of being logged under long-term contracts. Still unlogged were the Queets, Taholah and Crane Creek Units, comprising about 45,000, 30,000 and 35,000 acres respectively, in the southern half of the Reservation.

16. Beginning around 1946, in order to arrange for the logging of these three remaining units, the defendant set about gathering powers of attorneys from the owners of allotments in the Queets, Taholah, and Crane Creek Units, authorizing the defendant to enter into long-term logging contracts. Many allottees were told or encouraged to believe that unless they signed the powers, their timber would be left out of the logging contracts, and the Secretary might not permit it to be logged in their lifetimes. The defendant's employees obtained signatures without adequate or accurate explanation of the facts and the alternatives available, and with misrepresentation, and with undue influence. Plaintiffs were incapable of making an intelligent decision whether to sign the powers, and signed only in reliance on defendant's representation that it would be in their best interests to do so.

17. Pursuant to the aforesaid powers of attorneys and to its powers as trustee of the plaintiffs' land, the defendant, acting through the Superintendent of the Taholah Indian Agency, entered into a contract with the Aloha Lumber Company on April 26, 1950, covering the Taholah Unit. Under this contract, Aloha purchased the timber on all allotments within the boundaries of the Taholah Unit and for which the Secretary had a power of attorney, and agreed to log it over the next 29 years. This contract will terminate in 1979.

18. The Aloha Lumber Company contract established stumpage rates for different species of trees and provided for the periodic adjustment of such rates for the duration of the contract's life. In December, 1965, the Commissioner of Indian Affairs established a revised schedule of increased stumpage prices. Aloha's objections were pursued through administrative and judicial channels until an out-of-court settlement was negotiated in 1970. During the course of this dispute, Aloha paid for the timber in accordance with the increased rate schedules. However, the Secretary ordered that, pending final disposition of Aloha's special, increased revenue derived from Aloha's compliance was not to be distributed. The

disputed funds were paid into a special account held in escrow by defendant for the timber owners.

19. The Crane Creek Unit contract was entered into with Rayonier, Inc., on June 18, 1952. It was in essential respects similar to the Taholah Unit contract, except that the term was 34 years, so that it will terminate in 1986.

20. The Queets Unit, comprising about 45,000 acres, was put up for bids, but no bids were received. Consequenty, no long-term logging contract was let covering that unit, and logging since 1950 has been on an allotment-by-allotment basis. The defendant encouraged individual allottees in that unit to sell their land in fee, and discouraged or prohibited sales of timber only, and as a consequence, only about 5,700 acres of trust allotments with merchantable timber still remain in the Queets Unit, the rest having been sold to non-Indians.

21. The Act of February 14, 1920, 41 Stat. 415, 25 U.S.C. § 413, provides as follows:

> "The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or oher sources of revenue: *Provided*, That the amounts so collected shall be covered into the Treasury as miscellaneous receipts, except when the expenses of the work are paid from Indian tribal funds, in which event they shall be credited to such funds."

The Secretary's regulations, 25 C.F.R. § 141.18, provide:

> "In sales of timber from either allotted or unallotted lands, a reasonable deduction shall be made from the gross proceeds to cover in whole or in part the cost of managing and protecting the forest lands, including the cost of timber sale administration, but not including the costs that are paid from funds appropriated specifically for fire suppression or forest pest control. Unless special instructions have been given by the Secretary as to the amount of the deduction or the manner in which it is to be made, there shall be deducted 10 percent of the gross amount received for timber sold under regular supervision, and 5 percent when the timber is sold in such a manner that little administrative expense by the Indian Bureau is required. Service fees in lieu of administrative deductions shall be determined in a similar manner."

22. Since February 14, 1920, whenever a sale of timber from trust allotments or tribal trust land on the Quinault Reservation has taken place, the Secretary has collected from the proceeds of sale an administrative charge. Currently the charge is 10%, except where an Indian arranges for sale of his own timber, in which case the charge is currently 5%.

COUNT I

23. Defendant has at all times been under a duty, as guardian and trustee of plaintiffs and their property, to prudently manage and administer all sums of plaintiffs' money held by defendant, whether by way of principal or interest, and plaintiffs have been damaged to the extent that defendant has failed to carry out this duty. In particular, defendant has breached this fiduciary duty to plaintiffs in the following instances:

A. The funds held in escrow by defendant in 1965-1970 under the Aloha Lumber and ITT Rayonier contracts, pending resolution of price disputes, were not invested or credited with a reasonable and proper rate of interest.

B. Defendant is under a duty to insure that all funds held in trust for the allottees are distributed exclusively to individuals who are competent to handle such sums in a competitive society. Upon information and belief, plaintiffs allege that, under the logging contracts described above, defendant has failed to follow properly the special procedures established by its own agencies for determining such competency. Consequently, funds were disbursed to incompetent Indians who unwittingly

squandered or otherwise depleted their distributive shares in a manner wholly inconsistent with their health and general welfare.

C. Defendant has failed to prudently manage and administer funds held in trust for the Quinault Tribe, and for Indians who are *non compos mentis* or minors. Upon information and belief, plaintiffs allege that defendant has failed to credit these funds with a proper and reasonable rate of interest; that defendant has failed to cover these interest-bearing funds into the United States Treasury within 30 days of receipt; that defendant has failed to administer these funds in the most productive manner possible; that defendant has wrongfully charged these funds with expenditures for agency and administrative expenses which were the obligation of defendant to bear; that defendant has wrongfully held these funds in noninterest-bearing accounts before being expended or restored to interest-bearing status; that defendant has wrongfully made expenditures with interest-bearing funds when noninterest-bearing funds were available; and that defendant has otherwise mismanaged these funds in numerous ways which shall become apparent as the proofs develop.

D. Defendant is under a duty to disburse money collected for or on behalf of plaintiffs, under the logging contracts described above, quickly and expeditiously. Upon information and belief, plaintiffs allege that defendant has, from time to time, breached this duty by withholding distributions for unreasonably long periods of time.

E. In the exercise of its fiduciary duties, defendant has collected or received, since 1920, various monies, including payments from non-Indians for the purchase of plaintiffs' land and timber, for or on behalf of plaintiffs' land and timber, for or on behalf of plaintiffs, or defendant itself has become liable to pay monies to or on behalf of plaintiffs. Defendant has failed to account for its management, handling and disposition of said monies and properties. As a result, plaintiffs have been damaged by having been deprived of the amount of money or value of other property, together with interest thereon, which

may be shown to be owing to plaintiffs upon a proper accounting in accordance with the fiduciary duties and the liabilities herein set forth.

COUNT II

24. The administrative charges collected by defendant from sales of plaintiffs' timber have greatly exceeded defendant's properly allocated costs. Plaintiffs are entitled to a refund for the full amount of defendant's unjust enrichment, *i.e.*, the total of administrative fees less administrative costs. As an incident thereto, and in aid of a proper determination of the full extent of defendant's liability to plaintiffs, plaintiffs are entitled to an accounting of the fees collected by defendant, and of the administrative costs claimed by defendant to be properly allocable.

25. Pursuant to Rule 35(b), plaintiffs state that no action on this claim has been taken by Congress or by any other body. In Docket No. 524-69 Horton Capoeman, a Quinault allottee, claimed refund of the administrative charges, but his case was disposed of on the statute of limitations, without reaching the merits. See Opinion, April 16, 1971. Another petition making the same claim was filed in March, 1971, Docket No. 102-71, on behalf of the same class as herein. It is still pending.

WHEREFORE, plaintiffs are entitled to recover such damages as the proofs may show are proper and as their interests may appear, together with interest as such or as part of just compensation; the accountings described in Counts I and II which are necessary in de-

termining the full extent of defendant's liability, and such other relief as this Court may deem proper.

Respectfully submitted,

/s/ Charles A. Hobbs
CHARLES A. HOBBS
Attorney of Record for Plaintiffs
1616 H Street, N.W.
Washington, D.C. 20006

WILKINSON, CRAGUN & BARKER
R. Anthony Rogers
Alan I. Rubinstein
of Counsel

(Note: Pursuant to an agreement between counsel, Attachment A to this Petition, listing the names of individual plaintiffs, has not been reproduced in this Appendix.)

IN THE UNITED STATES COURT OF CLAIMS

No. 775-71

[Filed Feb. 2, 1973]

HELEN MITCHELL, ET AL.

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KUNZIG and BENNETT, *Judges*.

ORDER

This case comes before the court on defendant's motion, filed November 1, 1972, to dismiss the amended petition. Upon consideration thereof, together with the opposition thereto, without oral argument, on the basis of the decision by this court in *Klamath & Modoc Tribes* v. *United States*, 174 Ct.Cl. 483 (1966).

IT IS ORDERED that defendant's said motion to dismiss be and the same is granted and the petition is dismissed to the extent that it asks for an accounting by the defendant before the defendant's liability has been ascertained. The defendant's motion to dismiss is otherwise denied.

BY THE COURT
Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

No. 775-71

HELEN MITCHELL, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

ANSWER TO PLAINTIFFS' FIRST AMENDED PETITION

[Filed Mar. 30, 1973]

First Defense

Petitioners fail to state a claim upon which relief can be granted.

Second Defense

Petitioners allegations are so vague and general that the petition fails to meet the requirements set out in Rule 35, and therefore, the petition fails to state a claim upon which relief can be granted.

Third Defense

The petition fails to state a claim within the jurisdiction of this Court as to those claims alleged to have accrued prior to October 18, 1965, as such claims are barred by limitations, 28 U.S.C. 2501.

Fourth Defense

The petition fails to state a claim within the jurisdiction of this Court as to those claims that accrued prior to August 13, 1946, 28 U.S.C. 1505.

Fifth Defense

The petition is defective for misjoinder of issues as the issues presented are not common to all the plaintiffs.

Sixth Defense

The petition is defective for misjoinder of parties.

Seventh Defense

For answer to the numbered paragraphs of the petition, defendant asserts that:

1. The allegations in the introductory paragraph are conclusions of law requiring no answer.
2. Defendant admits the allegations in paragraph 1.
3. Defendant admits the allegations in paragraph 2, except defendant admits in the last sentence of paragraph 2 that the committee has only been recognized as spokesman for the allottees and has not been recognized as the representative of the allottees.
4. The allegations in paragraph 3 are conclusions of law requiring no answer.
5. Defendant denies the allegations in paragraph 4. For further answer to paragraph 4, the defendant alleges that the only parties plaintiff are those named at the date of filing the petition or those individuals who subsequently enter pursuant to the Court's order providing for giving of notice of class action.
6. Defendant admits the allegations in paragraph 5 and 6.
7. Defendant admits the allegations in paragraph 7.
8. Defendant admits the allegations in paragraph 8.
9. Defendant admits the allegations in paragraph 9.
10. The allegations in paragraph 10 as to the existence of a fiduciary duty and the alleged basis for such a duty are conclusions of law requiring no answer. Defendant does admit the existence of the various statutes and regulations cited.
11. Defendant admits the allegations in paragraph 11 that the Tribe owns a few small parcels of land, totalling about 4,000 acres, but the remainder of the allegations in paragraph 11 are conclusions of law requiring no answer.
12. Defendant admits the allegations in paragraph 12, except the first and last sentences are conclusions of law requiring no answer. Further, defendant is without

knowledge or information sufficient to form a belief as to whether some of the "allottees do not live on or within the required distance of the Reservation and so are ineligible to be members."

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13.

14. Defendant denies the allegations in paragraph 14.

15. Defendant admits the allegations in paragraph 15.

16. Defendant admits the allegation in paragraph 16 that the defendant obtained power of attorney from the owners of allotments in the Queets, Taholah, and Crane Creek Units authorizing the defendant to enter into long term logging contracts, but defendant denies the remainder of the allegations in paragraph 16.

17. Defendant admits the allegations in paragraph 17.

18. Defendant admits the allegation in paragraph 18 that in accordance with an order from the Secretary of the Interior, The Aloha Lumber Company paid the disputed increased stumpage rates to a special account held in escrow by the Secretary of the Interior. However, these funds have since been distributed together with interest. Defendant denies the remainder of the allegations in paragraph 18.

19. Defendant admits the allegation in paragraph 19 that the Crane Creek Unit contract was entered into with Rayonier, Inc., on June 18, 1952, and that the contract was for a 34 year term terminating in 1986. Defendant denies the allegation in paragraph 19 that the contract was in "essential respects similar to the Taholah Unit contract."

20. Defendant denies the allegations in paragraph 20, except defendant admits that no long-term contract was let covering the Queets Unit, and that logging since 1950 has been on an allotment-by-allotment basis.

21. Defendant admits the allegations in paragraph 21 in that such a statute and such a regulation exist, but denies that the statute and regulation are verbatim that which appears in paragraph 21.

22. Defendant denies the allegations in paragraph 22, except that defendant admits that the current charge for an Indian who arranges for the sale of his own timber is 5 percent.

23. The allegation in paragraph 23 as to the existence of a fiduciary duty is a conclusion of law requiring no answer. Defendant denies the remainder of the allegations in paragraph 23, and its subparagraphs A, B, C, D, and E. For further answer to paragraph 23 E, the defendant alleges that the Court of Claims, by Order dated February 2, 1973, granted the defendant's Motion to Dismiss as to the accounting procedure.

24. The allegations in the first two sentences of paragraph 24 are conclusions of law requiring no answer. As to the third sentence in paragraph 24, to the extent that plaintiffs ask for an accounting by the defendant before the defendant's liability, if any, has been ascertained, the Court of Claims, by Order dated February 2, 1973, granted the defendant's Motion to Dismiss.

25. The allegations in paragraph 25 are to meet the requirements of Rule 35(b) and no response appears necessary.

Respectfully submitted,

KENT FRIZZELL
Assistant Attorney General

JOHN H. GERMERAAD
Attorney
Department of Justice
Attorneys for Defendant

By ______________________
Attorney

IN THE UNITED STATES COURT OF CLAIMS

No. 775-71

HELEN MITCHELL, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

AMENDED ANSWER TO PLAINTIFFS' FIRST AMENDED PETITION

[Filed Oct. 13, 1976]

The defendant, as an amendment to its Answer to Plaintiffs' First Amended Petition, and without waiving the defendant's contention that the plaintiffs have no right to a general accounting herein, alleges:

1. The defendant has, from time to time, expended various sums of money out of many appropriations on behalf of the plaintiff Indian Tribe and on behalf of allottee plaintiffs and for the benefit of the plaintiff tribe and the allottee plaintiffs, to provide various items and services and for varied purposes, the amount of which is unknown to the defendant at this time.

2. The answer will be further amended if it should be determined that the plaintiff tribe and the allottee plaintiffs are entitled to maintain this suit and that the defendant is liable to the plaintiff tribe and any of the allottee plaintiffs in any amount.

3. The answer will also be further amended when the amount of the above-referred to disbursements becomes known so that such amount may be set-off as gratuitous expenditures, as reimbursable expenditures incurred in the care of the forests on the Quinault Reservation, and as disbursements for the welfare of the plaintiff tribe and of the allottee plaintiffs, and in mitigation of damages, should any damages be awarded the plaintiffs herein.

4. Should the Court find any sum due in favor of the plaintiff tribe or the plaintiff allottees, said plaintiffs are not entitled to any interest thereon.

Respectfully submitted,

PETER R. TAFT
Assistant Attorney General

DAVID M. MARSHALL
Attorney
Attorneys for Defendant

By: /s/ David M. Marshall
Attorney

IN THE UNITED STATES COURT OF CLAIMS

Docket Nos. 772-71, 773-71, 774-71, 775-71

HELEN MITCHELL, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

MOTION TO DISMISS

[Filed Sept. 30, 1977]

The defendant, the United States of America, moves, pursuant to Rule 38(b), to dismiss the petitions for lack of jurisdiction of the subject matter. Defendant states:

1. As to the claims of the individual allottee plaintiffs whether asserted by the allottees or in their behalf by either the Quinault Allottees Association or the Quinault Tribe, the court has no jurisdiction of the subject matter under 28 U.S.C. Sec. 1491 as to claims asserted by individual allottees or under 28 U.S.C. Sec. 1505 as to claims asserted by the Quinault Tribe.
2. As to the claims of the Quinault Tribe on its behalf, the Court has no jurisdiction under 28 U.S.C. Sec. 1505.

The attached Memorandum of Points and Authorities is made a part of this Motion.

Dated this 30th day of September, 1977.

Respectfully submitted,

JAMES W. MOORMAN
Assistant Attorney General

DAVID M. MARSHALL
Attorneys for Defendant

By: ______________________
Attorney

SUPREME COURT OF THE UNITED STATES

No. 78-1756

UNITED STATES, PETITIONER

v.

HELEN MITCHELL, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 18, 1979.

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE; 1979 297016 32

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-1756

UNITED STATES OF AMERICA,
Petitioner,
v.
HELEN MITCHELL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

RESPONDENTS' BRIEF IN OPPOSITION

CHARLES A. HOBBS
1735 New York Avenue, N.W.
Washington, D.C. 20006
Counsel for Respondents

WILKINSON, CRAGUN & BARKER
JERRY R. GOLDSTEIN
ROBIN A. FRIEDMAN
Of Counsel

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1756

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN MITCHELL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Helen Mitchell, some 1,465 individual Indians owning allotments on the Quinault Reservation, and the Quinault Tribe, respectfully urge that this Court deny the petition for writ of certiorari, seeking review of the Court of Claims' opinion in this case, reported at 591 F.2d 1300. We further respectfully urge, for reasons important to the timing of the resumption of trial, that the petition be denied before the Court adjourns for the Term.

QUESTIONS PRESENTED

1. Whether individual Indians and Indian tribes or groups may sue the United States for money damages under 28 U.S.C. §§ 1491 and 1505 when the United

States breaches its fiduciary duties in managing the Indians' trust land and monies.

2. Whether the legislative history of 28 U.S.C. § 1505 shows that Congress intended that the Court of Claims have jurisdiction over Indian claims for breach of trust.

3. Whether the petition raises any issue not already decided by *United States* v. *Testan*, 424 U.S. 392 (1976).

STATEMENT OF THE CASE

The Government's statement of the case is generally correct, but bears some elaboration. The Government states that:

> The forest resources on the allotted lands have been managed by the Department of the Interior, which has sold the timber from individual allotments and managed the revenue from the sales.[1]

This, however, does not describe the total control of the Interior Department, through its Bureau of Indian Affairs (BIA), over the management and disposition of respondents' lands and timber.[2] Normally, the BIA determines which blocks of timber shall be put up for sale. It then obtains a power-of-attorney from the allottee (or a resolution from the Tribe) after which the BIA handles every detailed aspect of a sale—advertisements for bids, letting of contracts, and supervision of the loggers who build roads, cut the timber, and haul it off. The BIA sees to the counting and grading of logs, collects the money, deducts its fee, and credits the balance to the Tribe's or allottee's BIA account. The Indians (who do not live on their timbered allotments) have little or nothing to do with the entire operation, except (1) signing the initial

[1] Petition for Certiorari (hereinafter "Petition") at 4.

[2] The BIA manages tribal lands as well as allotted lands.

power-of-attorney, and (2) opening the envelope with the check.

The Indian owner is not even allowed to cut and sell timber from his own allotment without the permission of the BIA and without posting a bond to assure compliance with the BIA's harvesting regulations.[3] Thus, the trust responsibilities of the Government here are not passive; the BIA has total control over the management of the Indians' land and timber.[4]

REASONS WHY THE WRIT SHOULD BE DENIED

1. Congress intended that the Court of Claims should have jurisdiction over Indian breach of trust cases.

The legislative history of the Indian Claims Commission Act of 1946, 60 Stat. 1049 (which Act contains what is now 28 U.S.C. § 1505, one of our two bases for jurisdiction) clearly manifests Congress' desire to end the need to petition Congress for special jurisdictional acts for Indian claims against the Government. Congress recognized that unless Indians were given the right to sue the Government for mismanagement of their trust funds and property, there would continue to be

> encourage[ment of] bureaucratic disregard of the rights of Indian citizens by a small minority of governmental officials who are comforted by the

[3] *See* 25 C.F.R. § 141.19 (1978).

[4] We would also note with respect to the facts that this case was filed in 1971 and, at that time, the Government raised no jurisdictional defense in its answer. The jurisdictional issue was not raised until 1977 after the first session of a multi-session trial, after the taking of more than a dozen depositions, after the development of over 20,000 pages of exhibits by respondents, and after extensive investigation and report work by a number of expert witnesses. The now two-year delay in this partially tried case over what we consider to be a grasping-at-straws issue has caused respondents considerable practical problems, not the least of which has been the death of an important expert witness.

thought that there is no judicial redress available to the victims of their maladministration. . . .[5]

Congressman (now Senator) Henry M. Jackson, a principal sponsor of the bill in the House, stressed the importance of this fact as a reason to provide Indians with access to the courts:

> The Interior Department itself has suggested that it ought not be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability . . . .
>
> . . . [L]et us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed.[6]

The House report summarized the purpose of the Act very succinctly as follows:

> [T]he statutory prohibition against litigation in the Court of Claims growing out of agreements with Indian tribes [12 Stat. 767] would be lifted and the Indian would henceforth have the same right as his white or black neighbor to secure a full and free hearing in the Court of Claims, or any other appropriate tribunal, *on any controversy with the Federal Government that may arise in the future.*[7]

Congress was also aware of the varied nature of Indians' claims, recognizing that: "All sorts of agreements have been made concerning the use and disposition of these [Indian] funds and promising protection of the

[5] H.R. Rep. No. 1466, 79th Cong., 1st Sess., at 5 (1945).

[6] 92 Cong. Rec. 5312 (1946). We wish to advise the Court that the Interior Department has recently reaffirmed its 1946 position and, pursuant thereto, urged the Justice Department not to seek reversal of the Court of Claims' decision in this case.

[7] H.R. Rep. No. 1466, 79th Cong., 1st Sess., at 3 (1945) (emphasis added).

lands retained by the Indians." [8] Indeed, in describing the nature of Indian claims, Congress specifically referred to a timber mismanagement claim of the Menominee Indians (much like our own here) for which a special jurisdictional act had been enacted, and which had been found by the Court to be a valid claim.[9] Congress observed:

> If we fail to meet these obligations by denying access to the courts *when trust funds have been improperly dissipated or other fiduciary duties have been violated,* we compromise the national honor of the United States.[10]

Thus, Congress in passing the Indian Claims Commission Act of 1946 clearly intended to give Indians the right to sue the United States in the Court of Claims to the same extent as other citizens, and it specifically intended that suits involving mismanagement of trust property were to be within the ambit of the federal courts' jurisdiction. Indeed, if such cases were not within the courts' jurisdiction, it is hard to see what post-1946 claims could be brought today, since all of the old treaty claims have been or will soon be resolved, and the principal activity of the Government since 1946 capable of generating Indian claims has been the performance of its role as manager of Indian trust property.

The failure of the Government to discuss or even mention the Indian Claims Commission Act in its petition for certiorari speaks volumes about the strength of the Government's case for certiorari. Obviously, if Congress intended in 1946 that Indians have the right to sue in the Court of Claims for mismanagement of their trust lands and monies, the only prerequisite to the court's jurisdiction over such a case is the finding of a trust

[8] *Id.* at 4.

[9] *Id.*

[10] *Id.* at 5 (emphasis added).

relationship. This is the essence of the Court of Claims' decision,[11] and it found the trust relationship here in the General Allotment Act of 1887, 24 Stat. 389, 25 U.S.C. § 348. In an identical situation in *Mason* v. *United States*, 198 Ct. Cl. 599, 461 F.2d 1364 (1972), the Court of Claims found jurisdiction under 28 U.S.C. § 1491 based upon the trust relationship found in the Osage Allotment Act, 34 Stat. 539.[12] The legislative history of the General Allotment Act, of which the Government makes so much in its petition for certiorari, is, of course, totally irrelevant in the face of the legislative history of the Indian Claims Commission Act.[13] Thus, there can be no doubt about the correctness of the Court of Claims' handling of the Government's unpersuasive arguments regarding a lack of jurisdiction in this case:

> If we accepted defendant's current argument, these objectives [of Congress in the Indian Claims Commission Act], so plainly expressed when the predecessor of section 1505 was adopted in 1946, could not be fulfilled, or even advanced. Congress would still have to do that which it did not want or expect to do in 1946—continue to pass special jurisdictional acts or from time to time to have to enlarge this court's general jurisdiction over Indian money claims. *We are justified, therefore, in concluding that Congress, when it passed section 1505, considered that Indian trust legislation, such as the General Allotment Act, supplies a proper foundation for Indian monetary suits in this court to recover compensation for proven breaches of those trusts.*[14]

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[11] Petition at 9a-11a.

[12] 198 Ct. Cl. at 617, 461 F.2d at 1374.

[13] *Naganab* v. *Hitchcock*, 202 U.S. 473 (1906), upon which the Government relies (Petition at 9 n.4), is also irrelevant since it was decided long before the Indian Claims Commission Act was passed. As the case did not even involve the General Allotment Act, the Government's use of it is doubly incorrect.

[14] Petition at 11a-12a (emphasis added).

We would further note that the Indian reservation here involved—the Quinault—is the same as that in *Squire* v. *Capoeman*, 351 U.S. 1 (1956). There the Court, in holding that the General Allotment Act exempted the timber sale proceeds from federal taxation, considered it important that the timbered land was of little value after the timber was cut. Thus, the Court reasoned that Congress intended that the proceeds of the sale should be preserved for the Indian undiminished by taxation.[15] How ironic it would be if the Government as tax collector could not diminish the value of the land, but as trustee could freely do so by gross mismanagement. It would be doubly ironic that a tax exemption was found in *Capoeman* by implication, contrary to the usual rule that "exemptions to tax laws should be clearly expressed," [16] while in the instant case jurisdiction would be denied because of failure to satisfy the usual rule that consent to sue the United States should be clearly expressed. Although 28 U.S.C. § 1505 does not expressly grant jurisdiction to sue for breach of trust, the legislative history makes it clear that this was precisely Congress' intent.

2. Jurisdiction in Indian cases like this one has been recognized by the Court of Claims and this Court for over a decade.

Contrary to the Government's assertion that the decision of the Court of Claims in this case is unprecedented,[17] jurisdiction over breaches of fiduciary duties by the United States has been upheld by the Court of Claims in a long line of Indian cases, one of which (*Mason*, see below) went on to be affirmed as to jurisdiction by this Court. These cases were brought by Indians un-

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[15] 351 U.S. at 10.

[16] *Id.* at 6.

[17] Petition at 12-13.

der 28 U.S.C. § 1491 and 28 U.S.C. § 1505, the two provisions relied upon by the Indians here.

The first such case was *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966), a claim brought under 28 U.S.C. §§ 1491 and 1505 by the Klamath Tribe and individual Indians for additional compensation for lands disposed of by the United States and for a general accounting. The Court of Claims held that it had no jurisdiction to order a general accounting, but stressed that it did have jurisdiction over the claims for monetary relief based upon the mismanagement of Indian trust funds and property by the United States (claims very similar, incidentally, to ours here):

> We emphasize that our action today [refusing to order a general accounting] does not leave the Klamath Tribe and the individual Indians without a forum for the recovery of any damages to which they are entitled because of the Government's mishandling of tribal funds and property. No special jurisdictional act is required to provide that relief.[18]

Subsequent Indian claims against the Government where jurisdiction was tacitly or expressly upheld include:

(2) *Navajo Tribe* v. *United States*, 176 Ct. Cl. 502, 364 F.2d 320 (1966), involving a tribal claim for inadequate compensation under three oil and gas leases;

(3) *Fields* v. *United States*, 191 Ct. Cl. 191, 423 F.2d 380 (1970), involving a claim by individual Indians for oil and gas rents and royalties;

[18] 174 Ct. Cl. at 491. No special jurisdictional act was required because the Court of Claims analyzed the legislative history of the Indian Claims Commission Act and concluded that Congress had clearly intended for Indians to be able to sue for damages if the United States mismanaged trust funds or property. *Id.* at 489-91.

(4) *Hebah* v. *United States*, 192 Ct. Cl. 785, 428 F.2d 1334 (1970), involving a claim by an individual Indian for damages pursuant to a treaty clause;

(5) *Mason* v. *United States*, 198 Ct. Cl. 599, 461 F.2d 1364 (1972), jurisdiction under 28 U.S.C. § 1491 cited and tacitly upheld but merits reversed, 412 U.S. 391 (1973) (discussed further below), involving a claim by an individual Indian heir for the wrongful use of trust funds to pay state inheritance taxes;

(6) *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238 (N.D. Cal. 1973), a federal district court case involving a tribal claim, similar to ours, for mismanagement of trust funds by the United States brought under 28 U.S.C. § 1346(a)(2), the district court counterpart of the Tucker Act, 28 U.S.C. § 1491;

(7) *Cheyenne-Arapaho Tribe* v. *United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975), involving tribal claims, similar to ours, for the mismanagement of Indian trust funds by the United States; and

(8) *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977), a decision involving a claim by an unincorporated association of Indians against the United States for selling a right-of-way across the plaintiff's land for an inadequate price (some of our claims are very similar).[19]

In addition, the Court of Claims has already issued three decisions in earlier test cases involving the very Indians in this case and in none of those decisions was jurisdiction ever questioned by the Government or by the court. The first was *Capoeman* v. *United States*, 194

[19] Although the Government attempts to raise the specter of huge damage awards to Indians for breaches of trust duties (Petition at 13), it is clear that this will not universally be the case by any means. The *Coast Indian* case, for example, awarded only $47,500.

Ct. Cl. 664, 440 F.2d 1002 (1971), involving the application of the statute of limitations to a claim against the United States for wrongfully deducting an administrative fee for managing an Indian's timber. Although the court decided against the Indian on the limitations issue, it relied upon 28 U.S.C. § 1491 as an adequate jurisdictional basis for the claim. In the repeat of that case on the merits, the Indians again lost, but the court again acknowledged jurisdiction under 28 U.S.C. § 1491. *Quinault Allottees Ass'n* v. *United States*, 202 Ct. Cl. 625, 485 F.2d 1391 (1973), *cert. denied*, 416 U.S. 961 (1974). Finally, in a procedural decision in this case, the Court of Claims ruled that this case was an "opt-in," as opposed to an "opt-out," class action,[20] again without questioning jurisdiction. *Quinault Allottees Ass'n* v. *United States*, 197 Ct. Cl. 134, 453 F.2d 1272 (1972).

One of the cases referred to above—the *Mason* case—was reviewed by this Court. Contrary to the Government's assertion,[21] the jurisdictional issue was contested and briefed by both sides in the Court of Claims. That court cited a long string of cases, including *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 605-06, 372 F.2d 1002, 1007-08 (1967), and stated:

> A suit against the United States on behalf of the estate of a non-competent Indian, for damages compensating the estate for breach by the Government of its trust obligation under a federal statute, is within 28 U.S.C. § 1491 as a claim founded upon an Act of Congress for damages "in cases not sounding in tort." The Osage Allotment Act [which is basically the same as the General Allotment Act] implies that if the Government breaches its trust duty to the pecuniary disadvantage of a non-competent Osage allottee, due compensation will be paid by the United States.[22]

[20] Due to this decision, which for most practical purposes denied class action benefits, the original 500 Indians were forced to expend great amounts of time and money contacting their scattered brethren and informing them about the case. To date, approximately 1,465 individual Indians and the Quinault Tribe have signed up as plaintiffs in the case.

[21] Petition at 12 n.7.

Apparently, for whatever reason, the Government decided to abandon the jurisdictional issue in the Supreme Court. This Court did, however, note without raising any question that jurisdiction was based on 28 U.S.C. § 1491,[23] although it reversed the lower court's decision on the merits.

In summary, the long line of cases dealing with the jurisdictional issue raised by the Government here clearly demonstrates that the issue is neither novel nor unsettled. Every time the Court of Claims has considered the issue since 1946 it has been compelled to reach the same result. Its decision here is therefore hardly "unprecedented" as the Government urges, but rather has been considered well-settled.

3. The issue raised by the Government has already been decided by this Court.

In addition to the reference in the *Mason* case above, this Court has considered the general issue of the Court of Claims' jurisdiction under 28 U.S.C. § 1491, and laid down the governing principle. The issue was first addressed at length by the Court of Claims itself in *Eastport Steamship Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F.2d 1002 (1967), where it stated:

> [I]t is not every claim involving or invoking the Constitution, a federal statute, or a regulation which is cognizable here. The claim must, of course, be for money. Within that sphere, the non-contractual

[22] 198 Ct. Cl. at 617, 461 F.2d at 1374.

[23] 412 U.S. at 394 n.5.

claims we consider under Section 1491 can be divided into two somewhat overlapping classes—[1] those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and [2] those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury. In the first group (where money or property has been paid or taken), the claim must assert that the value sued for was improperly paid, exacted or taken from the claimant in contravention of the Constitution, a statute, or a regulation. *In the second group, where no such payment has been made, the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum.*

* * * *

. . . *Under Section 1491 what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.*[24]

In *United States* v. *Testan,* 424 U.S. 392 (1976), this Court dealt with the same issue and approved the Court of Claims' ruling in *Eastport.* This Court stated:

> [T]he asserted entitlement to money damages depends upon whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for damage sustained." *Eastport S.S. Corp.* v. *United States*. . . .[25]

Thus, the general principle has been established by this Court—namely, that the statute for whose violation the plaintiff seeks damages must "fairly be interpreted as mandating compensation." This, in itself, is language of

[24] 178 Ct. Cl. at 605-07, 372 F.2d at 1007-09 (footnotes omitted; emphasis added).

[25] 424 U.S. at 400.

implication, and the Government is simply incorrect when it argues that jurisdiction cannot be inferred.[26] Such an argument flies in the face of the *Testan* and *Eastport* decisions.

This case merely involves the application of a rule already laid down by this Court to a specific situation. It seems hardly necessary or useful for the Court to re-

[26] Petition at 8. This Court has also upheld implied rights of action in other cases based upon statutes (*see, e.g., Cannon* v. *Univ. of Chicago,* 47 L.W. 4549, 4557 (1979); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229, 239 (1969)), and the Constitution (*see, e.g., Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971)).

We note that the Government concedes that the Court of Claims has jurisdiction where the claim is for money "improperly exacted or retained," but argues that "none of respondents' claims, with the possible exception of the claim based on excessive administration or road fees . . . are for money improperly exacted or retained." (Petition at 8 n.3.) The implication is that only a small portion of our claims fall within what the Government considers to be the undisputed jurisdiction of the Court of Claims (the first category referred to in the *Eastport* case quoted above).

The fact is that a substantial part of our claims (although it is impossible to quantify it at this time) is for monies improperly exacted or retained. The claim for administrative fees referred to by the Government involves the Indians' involuntary payment to the Government of a management fee far in excess of the value of the services rendered. In addition, the Government maintained a large fund consisting of advance payments from the loggers who bought the Indians' timber. This was invested by the Government and earned interest which the Government did not credit to the Indian timber owners, but kept and used for its own purposes. The Indians claim that they are the owners of this interest and that, therefore, it was money "improperly exacted or retained." Furthermore, the Government, in the course of determining the price which the loggers were required to pay, used a formula that deducted logging costs from the log value of the timber. The Indians claim that many of the Government's cost figures were excessive or wholly improper and, to that extent, represented Indian money "improperly exacted or retained," even though the benefit of the excessive charges was received by the loggers, not the Government. As far as the Indians were concerned, monies were improperly exacted from them by the Government. Among these charges improperly exacted were the road charges mentioned by the Government.

view the Court of Claims' application of the rule here, especially in light of the clear legislative history of the Indian Claims Commission Act manifesting Congress' intent that the Court of Claims have jurisdiction over Indian breach of trust cases.

4. The Court of Claims has jurisdiction over this case under the "implied contract" and "liquidated or unliquidated damages in cases not sounding in tort" clauses of 28 U.S.C. § 1491.

Even if the Court of Claims did not have jurisdiction over this case based upon an "Act of Congress" or "any regulation of an executive department," it would still have Tucker Act jurisdiction under the "implied contract" and "liquidated or unliquidated damages in cases not sounding in tort" clauses of 28 U.S.C. § 1491. Therefore, even were this Court to hold that this case does not come within the "Act of Congress" clause, the case could still logically come within the "implied contract" or "damages" clauses.

a. *Implied Contract*

Claims for damages for breach of an implied contract may be brought under the Tucker Act for contracts implied in fact, not for contracts implied in law. *Tatem Mfg. Co.* v. *United States*, 181 Ct. Cl. 496, 386 F.2d 898 (1967). For an implied in fact contract to exist, there must have been a meeting of the minds or tacit understanding, which can be inferred from the conduct of the parties in light of the surrounding circumstances, and there must have been some consideration flowing to the United States. *Somali Development Bank* v. *United States*, 205 Ct. Cl. 741, 750, 508 F.2d 817, 822 (1974); *Porter* v. *United States*, 204 Ct. Cl. 355, 365, 496 F.2d 583, 590 (1974), *cert. denied*, 420 U.S. 1004 (1975).

The Government's assertion that none of plaintiffs' claims are founded upon an "express or implied con-

tract with the United States" [27] is flatly incorrect. In this case the Government has, pursuant to 25 U.S.C. § 413, collected an involuntary fee from the Indians for managing their timberlands. By the Government's own regulations, these fees are intended to pay for virtually all costs associated with managing and protecting the forest lands and selling the timber. *See* 25 C.F.R. § 141.18 (1978). Clearly, the Government's collection of fees for managing and protecting the Indians' timberlands creates an implied contract which should entitle the Indians to recover in damages when the services they have paid for have been inadequate.[28] Surely there is a tacit understanding that the Indians will get the services for which they are paying and for which the Government, by its own statutes and regulations, has agreed to provide.

Moreover, the trust relationship established by the Treaty of Olympia and the General Allotment Act is itself a form of contract between the Indians and the United States whereby the United States undertook to protect the Indians and manage their property in exchange for the Indians ceding their land to the United States and ultimately accepting allotments.[29] At least one recent President has so recognized.[30] The courts, and

[27] Petition at 8 n.3.

[28] If given the opportunity, respondents will show at trial that the fees collected by the Government have grossly exceeded its own stated expenses.

[29] *Cf. Choate* v. *Trapp*, 224 U.S. 665 (1912) (Indians acquired contractual rights to tax exemption when they gave up their interests in tribal property and accepted individual land patents).

[30] In a widely noted message to Congress in July, 1970 (116 Cong. Rec. 23250), President Richard Nixon said that he believed that it was wrong to "terminate" Indians, *i.e.*, to unilaterally cancel the trust relationship with them for a number of reasons:

> First, the premises on which it [termination] rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it

even Congress, may no more abrogate this duty by withholding any redress for breach of the trust duty than they may abrogate other property rights of Indians.[31]

b. *Liquidated or Unliquidated Damages in Cases Not Sounding in Tort*

In addition, these claims fall under the category of "liquidated or unliquidated damages in cases not sounding in tort." Although this "catch-all clause" has been little used in the past, it has been applied by the Court of Claims to an Indian breach of trust claim in the *Mason* case discussed earlier. The court concluded that a claim by an Indian that the Government had breached its trust obligations by using trust funds to pay a state tax came within the provisions of 28 U.S.C. § 1491 as either founded upon an Act of Congress or for damages "in cases not sounding in tort." [32] Although this Court reversed this decision on the merits, it affirmed without comment the Court of Claims' finding of jurisdiction under Section 1491.[33] Presumably, therefore, this Court agreed with the lower court's reasoning on this point.

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can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations.

[31] In *Choate* v. *Trapp*, the property right was a tax exemption, and this Court said it was "not subject to impairment by legislative action." 224 U.S. at 677. *See also Jones* v. *Meehan*, 175 U.S. 1, 32 (1899).

[32] 198 Ct. Cl. at 617; 461 F.2d at 1374.

[33] 412 U.S. at 394 n.5.

We submit that if the "cases not sounding in tort" clause has any meaning at all, and we believe it does, it covers cases such as this one where the Government has breached its fiduciary duties to its Indian wards.

CONCLUSION

For the foregoing reasons, respondents urge that the petition for a writ of certiorari be denied. We further respectfully urge, for reasons important to the timing of the resumption of trial, that it be denied before the Court adjourns for the Term.

Respectfully submitted,

CHARLES A. HOBBS
1735 New York Avenue, N.W.
Washington, D.C. 20006
Counsel for Respondents

WILKINSON, CRAGUN & BARKER
JERRY R. GOLDSTEIN
ROBIN A. FRIEDMAN
Of Counsel

May 29, 1979

No. 78-1756

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN MITCHELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondents express surprise (Br. in Opp. 5) that the United States did not "discuss or even mention the Indian Claims Commission Act in its petition for certiorari * * *," and they more than make up for our omission by extensively rehearsing the legislative history of Section 24 of that Act, 28 U.S.C. 1505, in an attempt to defend the judgment below. But respondents' reliance on this statute is misplaced.

Section 1505 was enacted to afford Indian Tribes the same opportunity to sue the United States in the Court of Claims that had been afforded previously to individual litigants by 28 U.S.C. 1491. The purpose of 28 U.S.C. 1505 is to assure that each Indian Tribe is

> entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to

> the same defenses * * * as in cases brought in the Court of Claims by non-Indians under Section 145 of the Judicial Code (36 Stat. 1136 [now 28 U.S.C. 1491], as amended.

H.R. Rep. No. 1466, 79th Cong., 1st Sess. 13 (1945). Accordingly, when this statute was first enacted, it contained the following provision (60 Stat. 1055-1056):[1]

> In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under * * * section 250 of this title: *Provided, however,* That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands or groups.

Since 28 U.S.C. 1505 did no more than provide a parallel jurisdictional basis for suits brought by Indian Tribes in the Court of Claims, and did not alter the "defenses, both at law and equity" of the United States, respondents' contention that this statute waived the immunity of the United States for claims based on "breach of trust" (Br. in Opp. 7) is in error. Moreover, even if respondents were correct in their contention, their reasoning is unavailing

[1]This language was deleted as surplusage when Section 24 was recodified as 28 U.S.C. 1505 by the Act of May 24, 1949, ch. 139, Section 89(a), 63 Stat. 102. H.R. Rep. No. 352, 81st Cong., 1st Sess. 15-16 (1949).

for the 1465 individual litigants in this case who must prevail, if at all, under 28 U.S.C. 1491 rather than 28 U.S.C. 1505.[2]

2. Respondents are also incorrect in their assertion (Br. in Opp. 7) that the decision in this case is supported by "a long line of Indian cases" in the Court of Claims. Of the eight cases cited by respondents (*id.* at 8-9), seven did not even address the question whether the sovereign immunity of the United States has been waived for claims for money damages based on the theory of "breach of trust."[3] The only case that did address this issue did so in dicta. *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 491 (1966). The decision in the present case is thus the first instance in which the Court of Claims has confronted and decided the question for which we now seek review.[4]

[2]We note also that the Court of Claims has rejected the argument that 28 U.S.C. 1505 provides a jurisdiction for tribal claimants that is more extensive than the jurisdiction under 28 U.S.C. 1491 for individuals. *Klamath & Modoc Tribes* v. *United States,* 174 Ct. Cl. 483, 489-490 (1966). See also Pet. App. 5a n.10.

[3]Of the seven cases in which jurisdiction was assumed by the Court of Claims without discussion, at least two (*Fields* v. *United States,* 423 F. 2d 380 (Ct. Cl. 1970); *Mason* v. *United States,* 461 F. 2d 1364 (Ct. Cl. 1972), rev'd on other grounds, 412 U.S. 391 (1973)) are best understood as cases seeking the return of money "improperly exacted or retained." See *United States* v. *Testan,* 424 U.S. 392, 400, 401 (1976). We noted in the petition (Pet. 7-8 n.3) that sovereign immunity is not a bar to recovery for this limited category of claims.

[4]In *Mason* v. *United States, supra,* the Court of Claims simply assumed that the payment of taxes on allotted lands was a breach of a statutory duty for which Congress intended damages to be paid. See 461 F. 2d at 1374; Pet. App. 8a-9a. Contrary to respondents' implication (Br. in Opp. 10), the question of sovereign immunity was not raised by the United States in the Court of Claims in *Mason.* While our brief in that court in *Mason* discussed the absence of

3. Respondents suggest that there are two alternative grounds for supporting the judgment below. They contend (Pet. 14-17) that the claims in this litigation are within the jurisdiction of the Court of Claims either as claims based on an implied-in-fact contract or as claims for "liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491.

Even if such claims were within the lower court's jurisdiction, that would not alone resolve whether the sovereign immunity of the United States has been waived. See *United States* v. *Testan, supra,* 424 U.S. at 400. In any event, the theory of implied contract is far too narrow to support the broad-ranging conclusion of the Court of Claims that sovereign immunity has been waived for all damage claims by allottees based on "breach of trust" (Pet. App. 6a). And respondents' reliance on the "liquidated or unliquidated damages" provision of 28 U.S.C. 1491 simply proves too much: under their proposed interpretation of this provision, sovereign immunity would be waived for essentially *all* claims against the United States and the detailed provisions of the Tucker Act thus become meaningless. We understand the decision in *Testan* to have restricted the category of claims included within the "liquidated or unliquidated damages" provision of 28 U.S.C. 1491 to claims seeking the return of "money improperly exacted or retained." 424 U.S. at 401. As we noted in the petition (Pet. 7-8 n.3), this narrow provision cannot support the broad holding of the court below in this case.

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jurisdiction under 28 U.S.C. 1491 for claims based on tort, it is sufficiently clear after *Testan* that the jurisdictional reach of 28 U.S.C. 1491 and the question of sovereign immunity are distinct inquiries. See 424 U.S. at 400.

For the reasons stated here and in our petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

No. 78-1756

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN MITCHELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General

SANFORD SAGALKIN
Acting Assistant Attorney General

KENT L. JONES
Assistant to the Solicitor General

ROBERT L. KLARQUIST
JOSHUA I. SCHWARTZ
Attorneys
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-17a) is reported at 591 F.2d 1300.

JURISDICTION

The decision of the Court of Claims was filed on January 24, 1979. On April 19, 1979, The Chief Justice extended the time for filing a petition for a

writ of certiorari to and including May 24, 1979. The petition was filed on May 23, 1979, and was granted on June 18, 1979 (A. 85). The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States is answerable in money damages for alleged breaches of trust in connection with the management of forest resources situated on lands allotted to individual Indians under the General Allotment Act of 1887.

STATUTES INVOLVED

1. Section 1 of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended, 25 U.S.C. 331, provides in pertiment part:

> In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. * * *

2. Section 5 of the General Allotment Act of 1887, ch. 119, 24 Stat. 389, 25 U.S. 348, provides in pertinent part:

> Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * * and that at the expiration of said period the United States will convey the same by patent to said Indian * * *, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *.

3. 28 U.S.C. 1491 provides in relevant part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

4. 28 U.S.C. 1505 provides:

> The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe,

band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

STATEMENT

In four actions consolidated before the Court of Claims, respondents seek to recover damages from the United States for the alleged mismanagement of timber resources on land allotted to individual Indians from the Quinault Reservation in the State of Washington. The respondents are 1,465 individuals owning interests in such allotments, the Quinault Tribe, which now holds portions of the allotted lands, and the Quinault Allottees Association, an unincorporated association of Quinault Reservation allottees.

1. The Quinault Reservation was established in 1873 by executive order. I Kappler 923. Allotment of the Reservation lands to individual Indians began in 1905, pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat. 388, 25 U.S.C. 331 *et seq.* Section 5 of the Act, 25 U.S.C. 348, provided that the United States would "hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * *." This language was incorporated in the deed given to each allottee. The period during which the United States was to hold

the title of the lands thus allotted was subsequently extended indefinitely by Section 2 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 462.

Much of the land within the Quinault Reservation is forest land. In the early years of this century, the government took the position that the forested areas of the Quinault Reservation were not to be allotted under Section 1 of the General Allotment Act because they were not suited for "agricultural or grazing purposes * * *." 25 U.S.C. 331. This Court rejected that view in *United States* v. *Payne*, 264 U.S. 446 (1924), noting that "[i]t is common knowledge that vast bodies of land, originally covered with timber, in some of the public land States, including Washington, have been * * * cleared and brought under cultivation." *Id.* at 449. The Court concluded that the General Allotment Act did not preclude "an allotment of timbered lands, capable of being cleared and cultivated * * *." *Ibid.* Accordingly, pursuant to this Court's decision in *Payne*, the forested lands of the Quinault Reservation were allocated to individuals under the General Allotment Act, and by 1935 the entire Reservation had been allotted.

Since 1910, the Secretary of the Interior has been authorized to sell timber on the unallotted lands of any Indian reservation (Section 7 of the Act of June 25, 1910, ch. 431 36 Stat. 857, as amended, 25 U.S.C. 407) and to consent to the sale of timber by the owner of any Indian land "held under a trust or other patent containing restrictions on alienations" (Section 8 of the Act of June 25, 1910, ch. 431, 36 Stat. 857, as

amended, 25 U.S.C. 406). The Secretary is directed to pay the proceeds of such sales (after deducting a charge for administrative expenses) to the Tribe or the individual patent holder. 25 U.S.C. 406, 407. Prior to 1964, the Secretary was authorized to consent to sales of timber on individual holdings "pursuant to regulations" (Section 8 of the Act of June 25, 1910, ch. 431, 36 Stat. 857), and the statute did not detail how the Secretary should exercise this discretion. Since 1964, however, the Secretary has been instructed to consider the "needs and best interests of the Indian owner and his heirs" in approving the sales of timber on individual Indian holdings (Act of April 30, 1964, Pub. L. No. 88-301, 78 Stat. 187, amending 25 U.S.C. 406).

2. Respondents alleged in the Court of Claims that the Secretary has engaged in improper practices in connection with his management of timber lands allotted from the Quinault Reservation under the General Allotment Act. Specifically, they alleged that he has (Pet. App. 2a-3a n.4):

(1) failed to obtain a fair market value for timber sold;

(2) failed to manage timber on a sustained yield basis and to rehabilitate the land after logging; [1]

(3) failed to obtain payment for some merchantable timber;

[1] Since 1934, the Secretary has been required to adhere to the principles of sustained-yield forestry on all Indian forest lands under his supervision. 25 U.S.C. 466.

(4) failed to develop a proper system of roads and easements, and exacted improper charges from allottees for roads;

(5) failed to pay interest on certain funds;

(6) paid insufficient interest on certain funds;

(7) exacted excessive administrative charges from allottees.

They contend that they are entitled to recover in money damages for these alleged misdeeds because the Secretary's actions have breached a fiduciary duty owed them by the United States as trustee of the allotted lands.

The United States moved to dismiss respondents' actions in the Court of Claims on the ground that the United States had not consented to these suits or otherwise waived its sovereign immunity with respect to respondents' claims. The Court of Claims, sitting en banc, denied the government's motion. The court held that, in enacting the General Allotment Act, Congress created a cause of action for damages against the United States in favor of Indian allottees whenever they can show a "breach of trust" by the government in the management of their lands (Pet. App. 5a-6a).

The court reasoned that the General Allotment Act imposed fiduciary obligations on the United States [2]

[2] Because the court concluded that the Act by itself established the government's fiduciary responsibility and the consent to suit for breaches of trust, the court found it unnecessary to consider whether non-statutory, "unanchored judge-created principles of fiduciary law" concerning the govern-

and that this "congressional declaration of trust * * * 'can fairly be interpreted as mandating compensation by the federal government for the damage sustained' because of a proven breach of trust" (Pet. App. 6a, quoting *United States* v. *Testan*, 424 U.S. 398, 400 (1976)). The court stated that this conclusion was "the necessary inference from the statute" (Pet. App. 7a) because, if there is no damage remedy for proven breaches of trust, "there is in effect no real redress at all for a departure from the standards Congress imposed on the Government in the General Allotment Act" (*ibid.*). The court thus concluded that "breach of trust" claims for money damages under the General Allotment Act are within its jurisdiction under 28 U.S.C. 1491 as claims founded upon an "Act of Congress" (Pet. App. 4a-7a).[3] Similarly, the court concluded that the "breach of trust" claims brought by the Tribe as successor to individual allottees under

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ment's relations with Indian tribes can create a right to money damages within the court's jurisdiction (Pet. App. 5a, 14a). See pages 29-33, *infra*. The court similarly found it unnecessary to consider whether a cause of action for money damages against the United States is established by "the other pieces of legislation and regulation invoked * * * by the Indians" (Pet. App. 12a). See, *e.g.*, 25 U.S.C. 406 (authority to consent to sales of timber or Indian lands); 25 U.S.C 466 (operation of forest lands on sustained-yield basis); 25 U.S.C. 318a, 323-325 (use of roads and rights of way). See pages 26-29, *infra*.

[3] The court did not consider whether the allottees' claims would be within its jurisdiction as claims "for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491 (Pet. App. 5a). Nor did it consider whether the United States would be subject to suit on such claims.

the Act fall within its jurisdiction under 28 U.S.C. 1505 over tribal claims based on the "laws * * * of the United States" (*ibid.*).[4]

SUMMARY OF ARGUMENT

The Court of Claims has jurisdiction over individual claims for money damages founded upon an "Act of Congress," 28 U.S.C. 1491, and over tribal claims for money damages based upon the "laws * * * of the United States," 28 U.S.C. 1505. These jurisdictional provisions do not, however, create any substantive right enforceable against the United States. They merely provide jurisdiction for the court to hear such claims "whenever the substantive right exists." *United States* v. *Testan*, 424 U.S. 392, 398 (1976).

The Court of Claims erred in concluding that the General Allotment Act creates a substantive right to money damages for "breach of trust" in the management of allotted lands. Nothing in the statute or its legislative history overcomes the presumption that the

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[4] The court did not consider whether the United States is subject to suit for "breach of trust" claims with respect to lands held by the Tribe under statutes other than the General Allotment Act. The Tribe's pleadings (*e.g.*, A. 18, 19) can be construed to allege that the tribal lands at issue in this case are held by the Tribe as the successor to individual allottees under the Act.

The court also did not reach the question whether the Quinault Allottees Association is a "tribe, band or other identifiable group of American Indians," whose claims may be brought within the court's jurisdiction under 28 U.S.C. 1505. Accordingly, the issue was not raised in the government's petition.

United States has not consented to suit in money damages. The statute contains no "provision * * * that expressly makes the United States liable" or "grant[s] * * * [the] right of action with specificity." 424 U.S. at 400. Nor does the Act speak in terms of money claims against the United States or the right to receive certain payments on the proof of particular facts. The statute thus cannot " 'in itself * * * be fairly interpreted as mandating compensation' " for a breach of its obligations, as *Testan* requires. *Id.* at 401-402.

The Court of Claims was mistaken in concluding that a damage remedy must be implied because no other remedy can correct "damage already done" (Pet. App. 7a) and the damage remedy is necessary to afford "real redress" (*ibid.*) under the Act. This Court has rejected the claim that a statute establishing substantive rights "of necessity create[s] a waiver of sovereign immunity such that damages are available to redress their violation." *United States* v. *Testan, supra*, 424 U.S. at 400-401. Moreover, the Court of Claims conceded that prospective remedies are available to enforce the requirements of the Act (Pet. App. 7a). Thus, here as in *Testan* (424 U.S. at 403), "the situation * * * is not that Congress has left the respondents remediless, * * * but that Congress has not made available * * * the remedy of money damages."

Nor, as respondents suggest, does the special relationship between the United States and Indian tribes —based on non-statutory, "unanchored, judge-created principles of fiduciary law" (Pet. App. 5a)—establish a right to money damages for "breach of trust" within the court's jurisdiction over claims "for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491. Only Congress, and neither the courts nor executive officers, may consent to suit against the United States, and any waiver must therefore be effected by "affirmative statutory authority." *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940). "[U]nanchored, judge-created principles of fiduciary law" employed in judicial decisions to describe the underlying basis of the relations between the United States and Indian tribes do not constitute affirmative statutory consent to suit.

ARGUMENT

THE UNITED STATES IS NOT LIABLE IN MONEY DAMAGES FOR BREACHES OF TRUST IN THE MANAGEMENT OF LANDS ALLOTTED UNDER THE GENERAL ALLOTMENT ACT

A. The General Allotment Act Does Not Constitute Consent By The Government To Be Sued In Money Damages For Breaches Of Trust

1. *The General Allotment Act does not unequivocally and expressly consent to suit or mandate compensation in money damages for breaches of trust*

The Court of Claims has jurisdiction of "any claim against the United States founded either upon the Constitution, or any Act of Congress * * *." 28 U.S.C. 1491 (individual claimants). See also 28 U.S.C. 1505 (tribal claimants). In *United States* v. *Testan*, 424 U.S. 392 (1976), this Court rejected the contention that the jurisdictional provisions of the Tucker Act waive the "sovereign immunity [of the

United States] with respect to any claim invoking a constitutional provision or a federal statute * * *." *Id.* at 400. Because " 'the only judgments which the Court of Claims [is] authorized to render against the government . . . are judgments for money found due from the government to the petitioner' " (*United States* v. *King*, 395 U.S. 1, 3 (1969), quoting *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1867), a suit falls within the court's jurisdiction as a claim founded upon "the Constitution, or any Act of Congress" only if the constitutional provision or statute relied on creates a substantive right against the United States for "actual, presently due money damages," *United States* v. *King*, *supra*, 395 U.S. at 3. See *United States* v. *Testan*, *supra*, 424 U.S. at 398. The Tucker Act itself does "not create any substantive right enforceable against the United States for money damages," *ibid.*; instead, it merely "confers jurisdiction upon [the Court of Claims] whenever the substantive right exists." *Id.* at 398.[5] See also Devel-

[5] *Testan* addressed the jurisdiction of the Court of Claims over claims brought by individuals under the Tucker Act, 28 U.S.C. 1491. The same analysis applies, however, to the jurisdiction of the Court of Claims under Section 24 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1055, recodified as 28 U.S.C. 1505, which extended the court's jurisdiction to claims brought by Indian tribes against the United States.

The Indian Claims Commission Act implemented a dual approach to the determination of Indian claims. For claims arising prior to the effective date of the Act (August 13, 1946), the Indian Claims Commission was authorized to "hear and determine" claims against the United States based on legal and equitable principles and on considerations of "fair and honorable dealings that are not recognized by any exist-

ing rule of law or equity." 25 U.S.C. 70a. Congress intended to place tribal claimants in a preferential position in the determination of historical claims based on moral, as well as legal, obligations. For claims arising after that date, however, Congress intended to place tribal claimants on an equal footing with persons seeking recovery under the Tucker Act:

> As respects claims accruing after its adoption this bill confers jurisdiction on the Court of Claims to determine and adjudicate any tribal claim of a character which would be cognizable in the Court of Claims if the claimant were not an Indian tribe. In such cases the claimants are to be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, * * * as in cases brought in the Court of Claims by non-Indians under Section 145 of the Judicial Code (36 Stat. 1136, 28 U.S.C. 250) [now 28 U.S.C. 1491], as amended.

H.R. Rep. No. 1466, 79th Cong., 1st Sess. 13 (1945). See also *Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess. 149 (1945) (Assistant Solicitor Cohen). Accordingly, when the Indian Claims Commission Act was first enacted it contained the following provision in Section 24 (now 28 U.S.C. 1505):

> In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same maner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under * * * section [250 of this title] [now 28 U.S.C. 1491]: *Provided, however,* That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, band or groups. [60 Stat. 1055-1056.]

This language in the original version of the Act was deleted as surplusage when Section 24 was recodified as 28 U.S.C. 1505, by the Act of May 24, 1949, ch. 139, Section 89(a), 63 Stat. 102, because "the provision conferring jurisdiction

cannot in any view alter the relationship of the Government with its Indians." H.R. Rep. No. 352, 81st Cong., 1st Sess. 15-16 (1949).

The essential objective of 28 U.S.C. 1505 was thus to provide a basis for jurisdiction in the Court of Claims for suits brought by Indian Tribes that parallels the jurisdiction provided for individual claimants by 28 U.S.C. 1491. See *Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 489-490 (1966). See also note 24, *infra*.

Because, with respect to post-1946 claims, 28 U.S.C. 1505 merely parallels the jurisdictional grant in 28 U.S.C. 1491 for claims that "would be cognizable in the Court of Claims if the claimant were not an Indian tribe" (H.R. Rep. No. 1466, *supra*, at 13), and because the United States is entitled to the same defenses, both at law and in equity, under 28 U.S.C. 1505 as under 28 U.S.C. 1491 (*ibid.*), the conclusion that the Tucker Act "[did] not create any substantive right enforceable against the United States for money damages" (*United States* v. *Testan*, *supra*, 424 U.S. at 398) is equally applicable to the grant of jurisdiction in 28 U.S.C. 1505. The right to recover on a claim based on a "law * * * of the United States" under 28 U.S.C. 1505—as for claims based on an "Act of Congress" under 28 U.S.C. 1491—must therefore be premised on the existence of a substantive right to money damages under the statute that is claimed to be violated. See *United States* v. *Testan*, *supra*, 424 U.S. at 398-400.

The Court of Claims did not hold to the contrary. The court, however, did cite portions of the legislative history of the Indian Claims Commission Act suggesting that the Act granted jurisdiction over "any [tribal] *controversy with the Federal Government that may arise in the future*" (Pet. App. 10a; emphasis by court, quoting H.R. Rep. No. 1466, 79th Cong., 1st Sess. 3 (1946)). But the same sentence of this House Report quoted by the court also states that the jurisdictional grant in 28 U.S.C. 1505 gives Indian claimants, with respect to "any controversy with the Federal Government," "the same right as his white or black neighbor" to secure relief. H.R. Rep. No. 1466, *supra*, at 3. The jurisdictional grant in 28 U.S.C. 1505 was thus directly linked to the grant of jurisdiction for individual claimants in 28 U.S.C. 1491. The comments made by then-Representative Jackson, to the

opments, *Remedies Against The United States And Its Officials*, 70 Harv. L. Rev. 827, 876 (1957).

The Court of Claims erred in concluding that the General Allotment Act constitutes the necessary consent to suit and creates a substantive right to money damages for "breach of trust" in the management of allotted lands. Because of the basic principle "that a waiver of immunity cannot be implied but must be unequivocally expressed" (*United States* v. *Testan*, *supra*, 424 U.S. at 399, quoting *United States* v. *King*, *supra*, 395 U.S. at 4), the mere claim that a statute has been violated does not, by itself, establish a right to recover against the United States in money damages. Instead, a claim for money damages based on a statute must overcome the "presumption" that the United States has *not* consented to suit. *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927). Consent must therefore be "clearly shown" (*ibid.*) by a "provision" * * * that expressly makes the United States liable" or "grant[s] * * * [the] right of action * * * with specificity." *United States* v. *Testan*, *supra*, 424 U.S. at 400. The statute on which the claim is based must "unequivocally express[]" the government's consent to suit (*id.* at

effect that "special Indian jurisdictional acts would be unnecessary with respect to "misappropriation" of Indian funds by government officials (Pet. App. 10a, quoting 92 Cong. Rec. 5313 (1946)) is also consistent with this conclusion. For acts of misappropriation may constitute takings for which just compensation is required, and such claims have long been within the Court of Claims' jurisdiction under 28 U.S.C. 1491. See pages 20-21, *infra*.

399) and must, therefore, "in itself * * * be fairly interpreted as *mandating* compensation by the federal government for the damage sustained." *Id.* at 401-402 (emphasis supplied), quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967).[6]

The General Allotment Act does not constitute an unequivocal expression of the government's consent to suit in money damages for breaches of trust, as required by the Court's decision in *Testan.* To be sure, Section 5 of the Act provides that the United States is to "hold the land * * * in trust for the sole use and benefit of the" allottee. 25 U.S.C. 348. But the unelaborated statement in the statute that the allotted lands are to be held "in trust" does not clearly show a consent to suit in money damages if the trust is breached.[7] The fact that the statute is claimed to be violated cannot by itself support the conclusion that sovereign immunity has been waived, and "[n]othing on the face" of the statute (*Santa Clara*

[6] In concluding in *Testan* that a separate statute must be shown establishing a cause of action under the Tucker Act, the Court distinguished claims based on contract or for money "improperly exacted or retained." 424 U.S. at 400, 401. As we noted in the petition (Pet. 8 n.3), however, none of respondents' claims, with the possible exceptions of the claims based on excessive administration and road fees (Pet. App. 13a-14a n.19), are for money improperly exacted or retained. Nor are any of respondents' claims arguably founded on an "express or implied contract with the United States," 28 U.S.C. 1491. See note 21, *infra.*

[7] Moreover, as is discussed below (pages 21-29, *infra*), the Court of Claims erred in concluding implicitly that the "trust" obligation established by the Act extended to management functions.

Pueblo v. *Martinez*, 436 U.S. 49, 59 (1978)) "expressly makes the United States liable" in money damages or grants a right of action "with specificity." *United States* v. *Testan, supra*, 424 U.S. at 399-400.

Moreover, the statute cannot "in itself * * * fairly be interpreted as mandating compensation" for a breach of its obligations, as *Testan* requires. 424 U.S. at 401-402. A statute that "leave[s] no question" that refunds are to be made to particular claimants by an administrative officer, *United States* v. *Hvoslef*, 237 U.S. 1, 10 (1915), or that creates a "right to recover a certain sum," *Mosca* v. *United States*, 417 F.2d 1382, 1385 (Ct. Cl. 1969), may "in itself" fairly be interpreted as mandating compensation for its breach because the statutory "right" has substance only if it can be enforced in a suit for money damages if the claim is not paid. See also *Medbury* v. *United States*, 173 U.S. 492, 497 (1899) (statute created a right to be "repaid" by an administrative officer under "facts stated" in the statute). Similarly, if the statutory right "speaks in terms of money damages or of a money claim against the United States," *Gnotta* v. *United States*, 415 F.2d 1271, 1278 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970), the statute may "in itself * * * fairly be interpreted as mandating compensation" by the United States, for otherwise the "right" the statute creates would have no meaning. See *United States* v. *Testan, supra*, 424 U.S. at 402. In these contexts, the presumption that Congress meant to accomplish some substantive end by creating a "right to recover a certain sum" or a

"right" to a "repayment" overcomes the opposing presumption that Congress has not consented to suit. Compare *Medbury* v. *United States*, *supra*, 173 U.S. at 497; *United States* v. *Ohio Oil Co.*, 163 F.2d 633, 636 (10th Cir. 1947), with *Eastern Transportation Co.* v. *United States*, *supra*, 272 U.S. at 686. But nothing in the General Allotment Act speaks in terms of money claims against the United States or of the right to receive certain payments on the proof of particular facts. Nothing in the statute "in itself" (*ibid.*) considers, much less mandates, that money damages are to be available as a remedy for the breach of its obligations.

The Court of Claims concluded, however, that even though the General Allotment Act does not in terms purport to establish a cause of action in money damages for violations of its duties, such a remedy must be inferred because otherwise there "is in effect no real redress at all for a departure from the standards Congress imposed on the Government in the * * * Act" (Pet. App. 7a).[8] The court conceded that

[8] The Court of Claims placed some reliance on language in *Eastport S.S. Corp.* v. *United States*, *supra*, 372 F.2d at 1007, 1008, which suggests that a statute may create a right to money damages "by implication" (Pet. App. 7a n.12). But the Court in *Testan* did not quote or endorse this general language in *Eastport* in holding that a statute must "unequivocally," albeit by "fair interpretation," mandate compensation for its breach. See 424 U.S. at 398-400. Indeed, in *Testan* (424 U.S. at 400) the Court cited *Mosca* v. *United States*, *supra*, as consistent with its holding, and in *Mosca* the consent to suit was interpreted from a statute creating a "right to recover a certain sum," 417 F.2d at 1386. As we discuss in the text, a statute affording an individual a right to an administrative "repayment" of certain funds constitutes an "unequivocal" mandate for compensation, even though this results only from fair interpretation of the statute. See *Medbury* v. *United States*, *supra*, 173 U.S. at 497.

"prospective judicial review by way of injunction or mandamus" (*ibid.*) may be available to enforce the Act. But the Court concluded that these prospective remedies were inadequate because they "would be meaningless for damage already done." *Ibid.*

The court's analysis is fundamentally flawed. The fact that retrospective damages for breaches of trust in the management of allotted lands are not recoverable in a suit for injunctive relief cannot support the conclusion that Congress consented to suit in money damages for such claims. It is the ordinary result of sovereign immunity that unconsented claims for money damages are barred. The fact that such damages cannot be recovered without the sovereign's consent does not support the conclusion that consent has been given. If the Court were correct in concluding that a remedy in damages must be implied whenever the remedy is necessary to correct "damages already done" (Pet. App. 7a), the doctrine of sovereign immunity would be meaningless. Moreover, "many of the federal statutes * * * that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous." *United States* v. *Testan*, *supra*, 424 U.S. at 404. Thus, in *Testan* this Court rejected "as unsound" the claim that a statute establishing substantive rights "of necessity create[s]

a waiver of sovereign immunity such that money damages are available to redress their violation." 424 U.S. at 400-401.

As the Court of Claims recognized, allottees are not wholly without remedies to protect their statutory interest in having the allotted lands held in trust for their "sole use and benefit." 25 U.S.C. 348. Alleged violations of the duty to "hold [the land] in trust" under the Act may be remediable by injunctive or mandamus actions against the Secretary. See 28 U.S.C. 1331(a), 1361; 5 U.S.C. 702.[9] Furthermore, actions by the Secretary that appropriate the allotted lands for other uses, or uses by other persons, may be remediable in a suit for damages under the Fifth Amendment.[10] See *United States* v. *Testan*, *supra*,

[9] 5 U.S.C. 702 provides in part (emphasis supplied):

> An action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States * * *.

Thus, in consenting generally to suits for injunctive and declaratory relief, Congress expressly preserved sovereign immunity in suits seeking relief in money damages.

[10] An allottee who claims that he has been "unlawfully denied or excluded from any allotment" may bring suit under 25 U.S.C. 345 in federal district court to obtain a decree of his entitlement to the disputed allotment. This limited, express statutory remedy for allottees further negates the suggestion that Congress intended, without so stating, to allow an award in money damages.

424 U.S. at 401; *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935); *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933). The substantive provisions of the Act are thus not made meaningless by the absence of a damage remedy which Congress did not provide. Here, as in *Testan* (424 U.S. at 403),

> [t]he situation * * * is not that Congress has left the respondents remediless, * * * but that Congress has not made available * * * the remedy of money damages * * *.

The Court of Claims thus erred in "go[ing] beyond the language of the statute [to] impose a liability [in money damages] which the Government has not declared its willingness to assume." *Price* v. *United States*, 174 U.S. 373, 375 (1899).

2. *The legislative history of the General Allotment Act supports the conclusion that Congress did not consent to suit for money damages for breaches of trust in the management of allotted lands*

a. In the lengthy legislative history preceding passage of the General Allotment Act,[11] there is no "unequivocal expression of * * * legislative intent" (*Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 59) to subject the United States to suit in money

[11] The Act was enacted in 1887. Substantially similar bills were debated in the Senate as early as 1881. S. 1773, 46th Cong., 3d Sess. (1880). See 11 Cong. Rec. 778-788, 873-882, 904-913, 994-1003, 1028-1036, 1060-1070 (1881). Bills essentially identical to the legislation ultimately enacted were passed by the Senate in 1882 and 1884 but not acted upon in the House. S. 1455, 47th Cong., 1st Sess. (1882); S. 48, 48th Cong., 1st Sess. (1883). See 13 Cong. Rec. 3212 (1882); 15 Cong. Rec. 2240-2242, 2277-2280 (1884); 16 Cong. Rec. 218, 580 (1885); H.R. Rep. No. 2247, 48th Cong., 2d Sess. (1885).

damages for claimed breaches of trust under the Act. Indeed, throughout the debates on this legislation, there is not one statement by any Member of Congress suggesting that the United States would be liable to suit in money damages with respect to any claim under the Act. To the contrary, the legislative history reveals an intent that is radically inconsistent with the Court of Claims' broad conclusion that Congress consented to a damage remedy against the United States as a means of enforcing the "standards * * * imposed on the Government in the General Allotment Act" (Pet. App. 7a).

In providing for the allotment of lands to individual Indians under this Act, Congress intended the allotted lands to be occupied as homesteads by the allottees for their personal use in agriculture or grazing. See *Mattz* v. *Arnett*, 412 U.S. 481, 486 (1973); 13 Cong. Rec. 3211 (1882) (Senator Dawes) (the allottee is to be "the occupant of the land and enjoy all its use * * *)"; 17 Cong. Rec. 1630-1631 (1886) (Senators Plumb and Dawes); 18 Cong. Rec. 190-191 (1887). The allotment of individual homesteads to Indians was pursuant to a congressional policy of assimilating Indians into the larger society, a policy that was based on the belief that the holding of land in common was the central obstacle to "civilization" of the Indian. See F. Cohen, *Handbook of Federal Indian Law* 206-209 (1942); 11 Cong. Rec. 1060 (1881). Congress anticipated that only lands suitable for homesteading would serve this objective of

assimilation, and thus provided in Section 1 of the Act, 25 U.S.C. 331, for the allotment only of lands that "may be advantageously utilized for agricultural or grazing purposes * * *." See *United States* v. *Payne*, *supra*, 264 U.S. at 449. It was Congress' intent that, after a 25-year period during which the Indian allottee was to be "the occupant of the land and enjoy all its use" (13 Cong. Rec. 3211 (1882) (Senator Dawes)), the allottee would receive a fee patent title to the land from the United States. 25 U.S.C. 348.[12]

The original version of this legislation in the Senate provided that, during the initial 25-year period of the allotment, title to the allotted land would be held by the Indian under a simple restraint on alienation, rather than by the United States "in trust." This language was amended at the request of Senator Dawes to provide that the United States would "hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * *." 13 Cong. Rec. 3212 (1882). In offering the amendment, Senator Dawes explained that the "trust" provision would "secure to the Indian his rights" to title in the land at the expiration of 25 years "precisely as the other provision [containing a restraint on

[12] The period during which the title was to be retained by the United States was not extended indefinitely until Congress enacted Section 2 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 462.

alienation] would." [13] *Ibid.* The difference achieved by the amendment was that, while the States may have attempted to tax the allotted lands if title were given to individual Indians under simple restraints on alienation, placing title in the United States in trust for the allottees made it "impossible to raise the question of [state] taxation * * *." *Ibid.*

The General Allotment Act thus did not, as the Court of Claims implicitly concluded, anticipate that the United States would undertake broad management responsibilities as a statutory trustee for the allotted lands. The allottees were expected to occupy and manage the land, enjoying all its use in agricultural and grazing activities. The United States undertook to "hold the land * * * in trust" *not* with the objective of overriding or controlling the Indians' right to exclusive use and possession of the land, but instead for the limited purposes of (a) restraining improvident alienation of the land by the allottees and (b) affording an immunity from state taxation for the period during which legal title remained in the United States. 13 Cong. Rec. 3211 (1882) (Senator Dawes).[14] This limited objective of the statutory

[13] Senator Dawes provided this explanation of his amendment in the course of offering the identical language as an amendment to an allotment act for the Umatilla Reservation. 13 Cong. Rec. 3210, 3211 (1882). See *id.* at 3212.

[14] *Minnesota* v. *United States*, 305 U.S. 382 (1939), is not inconsistent with this conclusion. In that case, the Court held that the United States was an indispensable party in a state action condemning allotted lands because the United States held legal title to the lands. The government's limited authority to "hold" the lands was there at issue; the Court did not suggest that the United States would be liable in damages for any breach of trust or detail the nature of the trust duty. In an analogous context, however, the Court has noted, with regard to an Indian allotment in fee with a restraint on alienation, that "the United States holds title in trust only to prevent improvident alienation." *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206, 213 (1943), aff'g 127 F.2d 349, 353-354 (10th Cir. 1942). The same description has been applied to lands allotted under the General Allotment Act in *Eastman* v. *United States*, 28 F. Supp. 807, 808 (W.D. Wash. 1939), rev'd on other grounds, 118 F. 2d 421 (9th Cir.), cert. denied, 314 U.S. 635 (1941). See also *Nicodemus* v. *Washington Water Power Co.*, 264 F.2d 614, 616-617 (9th Cir. 1959); *Fort Peck Indians* v. *United States*, 132 F. Supp. 222 (Ct. Cl. 1955).

undertaking to "hold the land * * * in trust" is reflected at several points in the legislative history. See 15 Cong. Rec. 2240-2242 (1884) (remarks of Senators Dawes, Coke and Conger); 15 Cong. Rec. 2278-2279 (1884) (remarks of Senators Miller, Coke and Dawes). The Court of Claims' broad conclusion that a damage remedy for breach of the "trust" under the Allotment Act is necessary to enforce the "standards Congress imposed" (Pet. App. 7a) is inconsistent with the narrow objectives that Congress sought to accomplish in enacting this legislation.[15]

[15] There is no claim in this case that any allottee has been denied the right to occupy and use his allotment. If, however, the United States were to misappropriate an allotment and displace its proper owner, the allottee is authorized to sue for the recovery of his allotment under 25 U.S.C. 345. There is no need for any reliance on a "breach of trust" theory to support the Indian's claim of right to ownership of the allotment.

Nor is there any claim in this case that the allottee has been subjected to improper state taxation contrary to Congress'

b. Prior to 1910, the Secretary of the Interior had no general statutory authority to consent to any sales of timber on Indian lands. Early decisions had established that Indians held only the right of occupancy, and not fee title, to Indian lands and that they therefore could cut timber from their lands only for the purpose of improving the land and not for the primary purpose of sale. *United States* v. *Cook*, 86 U.S. (19 Wall.) 591 (1873). The Attorney General ruled in 1889 that, unless some statute expressly authorized the sale, this same rule was equally applicable to allotted as well as unallotted lands. 19 Op. Att'y Gen. 232 (1889). Congress ratified the Attorney General's ruling by enacting the Act of February 16, 1889, ch.

objection in placing title to the land in the United States in trust. If an allottee were subjected to improper state taxation, it may be that a failure by the United States to oppose the tax would be a breach of the limited objectives of the statutory "trust." In *United States* v. *Mason*, 412 U.S. 391, 398 (1973), the United States did not argue that it was immune to a suit for money damages by allottees who claimed that the government committed a breach of trust by failing to resist state tax assessments on the allotted lands. The government's defense on the merits was sufficient in that case, *id.* at 392, and sovereign immunity was not raised. Even assuming that failure to protect the lands from state taxation would in some circumstances be a breach of the limited statutory "trust" (see *id.* at 398), there is nothing in the Act or its history that constitues an "unequivocal expression" (*Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 59) of a congressional consent to suits in money damages against the United States even in this limited context. See also pages 11-21, *supra*. In any event, in this case the Court of Claims inferred a waiver of immunity as to duties that the Act did not impose.

172, 25 Stat. 673, which authorized the sale of dead timber on Indian allotments and reservations but did not permit the sale of live timber.[16] Thereafter, Congress enacted special legislation from time to time to authorize the removal and sale of timber on particular reservations. *E.g.*, 30 Stat. 62, 90; 31 Stat. 785; 34 Stat. 91. Finally, in 1910 the Secretary was authorized generally to sell timber on unallotted lands and apply the proceeds of the sales (after deductions for administrative expenses) to the Indians' benefit. Act of June 25, 1910, ch. 431, Section 7, 36 Stat. 857, as amended, 25 U.S.C. 407. At the same time, Congress authorized the Secretary to consent to the sale of timber by the owner of any Indian land "held under a trust or other patent containing restrictions on alienations" (Section 8, as amended, 25 U.S.C. 406(a)). The Secretary was directed to pay the proceeds of such sales (after deductions for administrative expenses) to the "owner" of the allotted lands. *Ibid.*

The course of this legislation makes clear that Congress did not contemplate in 1887, when the General Allotment Act was enacted, that the Secretary would conduct timber sales for allotted lands.[17] Indeed, it was Congress' intent to allow allotments only of land that "may be advantageously utilized for agricultural

[16] See also *Starr* v. *Campbell*, 208 U.S. 527 (1908) (timber could not be cleared by Indians from allotted lands for the primary purpose of sale).

[17] Similarly, it was not until 1934 that Congress directed the Secretary to manage Indian forestry units on a sustained-yield principle. 25 U.S.C. 466.

or grazing purposes." 25 U.S.C. 331. The need to remove timber for the primary purpose of sale, rather than for the purpose of improving the land for agricultural use, was not foreseen as a consequence of the Act. See *United States* v. *Payne, supra*, 264 U.S. at 449. It is thus a misreading of history to suggest that the Act established a "trust" responsibility for the management of allotted forest lands.

Moreover, when Congress did authorize the Secretary to consent to the sale of timber on allotted lands in 1910, Congress did not distinguish between lands held "under a trust or other patent containing restrictions on alienations * * *." 25 U.S.C. 406(a). See also 25 U.S.C. 466 (sustained-yield management for all "Indian forestry units"); notes 2, 17, *supra*. No doubt for this reason, the Court of Claims abjured any reliance on these management statutes (Pet. App. 12a) in reaching its broad conclusion that the General Allotment Act establishes the government's consent to suit to "breach of trust" claims for money damages by Indian allottees. There is, in any event, nothing in the language of these statutes, or in their legislative history, that unequivocally establishes the government's liability to suit for "breach of trust" in the management of timber resources on allotted lands.[18] In directing the Secretary to make certain

[18] Respondent's allegation that unlawful fees have been exacted by the Secretary in the administration of timber sales (see page 7, *supra*) may be within the Court of Claims' jurisdiction as a suit for money "improperly exacted or retained." *United States* v. *Testan, supra*, 424 U.S. at 400, 401. See note 6, *supra; Clapp* v. *United States*, 117 F. Supp. 576 (Ct. Cl.), cert. denied, 348 U.S. 834 (1954). But see *United States* v. *Holland-America Lijn*, 254 U.S. 148 (1920). But this narrow theory of jurisdiction cannot support the broad holding of the Court of Claims that the General Allotment Act creates a remedy for "breach of trust" in the management of the allotted lands.

discretionary management decisions, the statutes contain no "provision * * * that expressly makes the United States liable" or "grant[s] * * * a right of action with specificity." *United States* v. *Testan, supra*, 424 U.S. at 400. Nor do the statutes speak in terms of money damages or of a money claim against the United States for "breach of trust." [19] See *Gnotta* v. *United States, supra*, 415 F.2d at 1275. The statutes thus do not overcome the presumption that the United States has not consented to suit for such claims. See, *e.g.*, *United States* v. *Testan, supra*, 424 U.S. at 398; *Jackson* v. *Lynn, supra*, 506 F.2d at 236.

B. The Special Relationship Between The United States And Indian Tribes Does Not Create A Consent To Suit In Money Damages For Breaches Of Trust In The Management Of Indian Lands

The Court of Claims found it unnecessary to consider whether the special relationship between the United States and Indian tribes—based on "un-

[19] The statutes do support a claim that the United States has consented to suit to enforce its undertaking to pay the proceeds of timber sales (after deducting administrative expenses) to the owners of the allotted lands under 25 U.S.C. 406(a). See *Jackson* v. *Lynn, supra*, 506 F.2d at 236 (a right "for the payment of money"); *United States* v. *Ohio Oil Co., supra*, 163 F.2d at 636 (an "express obligation to pay"). Respondents do not contend, however, that the Secretary has failed to pay over the proceeds of any sale or failed otherwise to expend the money for their benefit as the statute permits. 25 U.S.C. 406(a).

anchored, judge-created principles of fiduciary law" (Pet. App. 5a)—establishes a right to money damages for "breach of trust" within the court's jurisdiction over claims "for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491.[20] Nor did respondents advance this contention in the Court of Claims. Although they do so now, as an alternative basis for supporting the judgment below (Br. in Opp. 16-17), the question is not properly presented for review in this court.[21] We nonetheless address it briefly at this point.

It is fundamental that the United States may not be sued without its unequivocal consent. *United States* v. *Testan, supra*, 424 U.S. at 399; *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). There must be "affirmative statutory authority" for the

[20] The court chose to rely solely on the theory that the General Allotment Act creates a right to money damages for "breach of trust" within the court's jurisdiction over individual claims founded upon an "Act of Congress," 28 U.S.C. 1491, and tribal claims based on a "law[] * * * of the United States," 28 U.S.C. 1505. See Pet. App. 4a-8a.

[21] *E.g.*, *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967). For the same reason, respondents' suggestion that the Treaty of Olympia and the General Allotment Act are "a form of contract" within the Court of Claims jurisdiction over claims based on contract (28 U.S.C. 1491) is not properly presented in this case. The claim was not raised by respondent below, nor was it addressed by the Court of Claims. We note, moreover, that the Court of Claims lacks jurisdiction under 28 U.S.C. 1491 for claims based on treaties. See 28 U.S.C. 1491. The suggestion that a treaty is "a form of contract" thus represents an attempt to circumvent this limitation on the court's authority.

suit, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940), and the consent to suit may not be applied "more broadly than has been directed by Congress." *United States* v. *Shaw*, 309 U.S. 495, 502 (1940). This is because only Congress, and neither the courts nor executive officers, may consent to suit against the United States. *United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. at 513; *United States* v. *Shaw*, *supra*, 309 U.S. at 500, 502; *Munro* v. *United States*, 303 U.S. 36, 40-41 (1938).[22]

The "unanchored judge-created principles of fiduciary law" surrounding the government's relations with Indians (Pet. App. 5a) do not constitute "affirmative statutory authority" establishing the government's consent to be sued in money damages for "breach of trust" in the management of Indian lands. Numerous decisions, of course, refer to the "fiduciary" or "guardianship" responsibilities of the United States in its dealings with Indian Tribes. *E.g.*, *United States* v. *Kagama*, 118 U.S. 375, 384 (1886); *McKay* v. *Kaylton*, 204 U.S. 458, 469 (1907); *United States* v. *Creek Nation*, *supra*, 295 U.S. at 109-110; *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942).[23] But a consent to suit in money damages

[22] These principles apply to Indian claimants, as well as other claimants, without distinction. See, *e.g.*, *Klamath Indians* v. *United States*, 296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903).

[23] None of these cases presented or confronted the question whether the sovereign immunity of the United States is waived for "breach of trust" in the management of Indian lands. See also notes 14, 15, *supra*.

for "breaches of trust" cannot be implied merely on the basis of judicial decisions that employ "the word 'fiduciary' and the expression 'guardian ward relationship' * * * to describe generally the nature of the relationship existing between the Indians and the Government." *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776, 780-781 (Ct. Cl. 1956). See also *Skokomish Indian Tribe* v. *France*, 269 F.2d 555, 560 (9th Cir. 1969).[24] These judicial descriptions of the underlying basis of relations between the United States and Indians do not constitute the government's consent to suit. Only Congress, and not the courts, can waive the government's immunity and the waiver must be unequivo-

[24] The history of Section 24 of the Indian Claims Commission Act, as amended, 28 U.S.C. 1505, does not support respondents' contention (Br. in Opp. 3-7) that Congress intended to create a general right of action for Indian Tribes against the United States on the theory of "breach of trust." During the debates on the Indian Claims Commission Act, then-Representative Jackson explained that "section 24 of the bill provides that with respect to all grievances that may arise hereafter Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims * * *." 92 Cong. Rec. 5313 (1946). In *Klamath and Modoc Tribes* v. *United States, supra*, 174 Ct. Cl. at 489-490, the Court of Claims correctly observed that "section 24 of the Act does exactly what Congressman Jackson said it was intended to do; namely, it gives to Indian tribes the same right to sue in this court as is granted to others under the Tucker Act." And, as this Court held in *United States* v. *Testan, supra*, 424 U.S. at 398, the Tucker Act does not create any substantive rights. Instead, it "merely confers jurisdiction whenever the substantive right exists." *Ibid.* See also note 5, *supra*.

cally expressed by "affirmative statutory authority." *United States* v. *United States Fidelity & Guaranty Co., supra*, 309 U.S. at 514. The Court of Claims thus properly withheld any reliance on "unanchored judge-created principles of fiduciary law" (Pet. App. 7a) in determining whether the United States consented to suit for "breach of trust." [25]

The courts' jurisdiction over claims for "liquidated or unliquidated damages in cases not sounding in tort" (28 U.S.C. 1491) also fails to provide an express consent to suits in money damages for "breach of trust." As this Court concluded in *United States* v. *Testan*, the Tucker Act "does not create any substantive right enforceable against the United States for money damages." 424 U.S. at 398. Instead, the Act "merely confers jurisdiction upon [the Court of Claims] whenever the substantive right exists." *Ibid.* The Tucker Act jurisdiction over claims for "liquidated or unliquidated damages" thus does not create

[25] See also *Whiskers* v. *United States*, No. 77-1620 (10th Cir. June 14, 1979), where the court held that general fiduciary principles applicable to the relations of Indians and the United States do not satisfy the requirement in *Testan* that there be a "specific congressional mandate to compensate those injured by the violation of some substantive right." Slip op. 10. The court stated that a "legislative declaration of trust status for a particular fund" (slip op. 6) would constitute a mandate for compensation if payment from the fund is not made. See also *Medbury* v. *United States, supra*, 173 U.S. at 497; *United States* v. *Ohio Oil Co., supra*, 163 F.2d at 636. But the court found no such legislative mandate for payment from the particular fund at issue in that case. Slip op. 6-9.

any substantive right in money damages against the United States for claims based on the theory of breach of trust. Moreover, the contention that the court's jurisdiction over claims for "liquidated or unliquidated damages" creates a substantive right to recovery in money damages simply proves too much: if that interpretation of the provision were correct, sovereign immunity would be waived for essentially *all* claims against the United States and the detailed provisions of the Tucker Act and the many federal statutes "that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be superfluous." *Id.* at 404. The language of this provision should not be construed to "swallow practically everything that preceeds it." 1 J. Moore *Federal Practice* ¶ 0.65 [2.-3], at 700.112 n.39 (2d ed. 1979). As one commentator has stated, "[t]he evident purpose of the section is to make clear that the action may seek unliquidated damages as well as sums illegally exacted or amounts fixed by a contract." *Ibid.* The section also makes express the congressional intent "to prevent any tort action from being brought" in the Court of Claims. Developments, *Remedies Against The United States And Its Officials*, *supra*, 70 Harv. L. Rev. at 881. The provision is not intended, and has never been applied, to create a substantive right to recovery for "breach of trust."

CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SANFORD SAGALKIN
Acting Assistant Attorney General

KENT L. JONES
Assistant to the Solicitor General

ROBERT L. KLARQUIST
JOSHUA I. SCHWARTZ
Attorneys

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1756

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN MITCHELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS

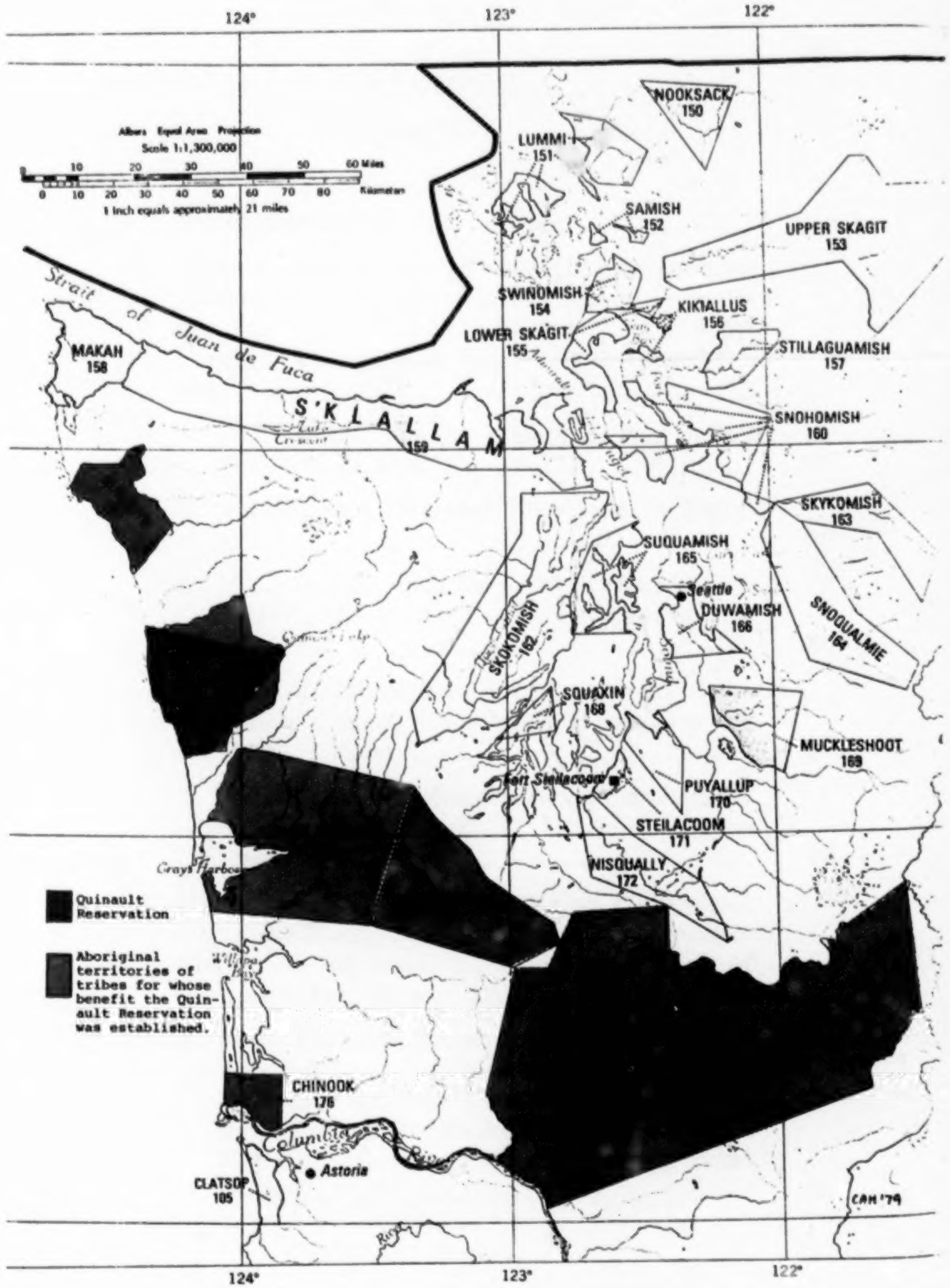
CHARLES A. HOBBS
1735 New York Avenue, N.W.
Washington, D.C. 20006

Counsel for Respondents

WILKINSON, CRAGUN & BARKER
JERRY R. GOLDSTEIN
ROBIN A. FRIEDMAN

Of Counsel

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001



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STATEMENT OF THE CASE

The Justice Department's brief understandably omits many of the relevant background facts of this case,[1] so we shall make a separate statement. The plaintiffs in

[1] We refer to the petitioner as "the Justice Department" rather than "the Government," because the Interior Department, the agency of the United States legally responsible for carrying out the trust duties owed to these plaintiffs (see note 10 below) does not agree with the Justice Department that the court lacks jurisdiction.

this case are 1,465 individual Indians and the Quinault Tribe, who are beneficial owners of trust land on the Quinault Indian Reservation, Washington.[2] The defendant is the United States, which is the trustee of the plaintiffs' land.

The individual plaintiffs are descendants of the Indians of several tribes who originally owned and occupied the Pacific coastal region of the United States north of the Columbia River. In 1855 the Government entered into a treaty with some of these tribes. Treaty of Olympia (ratified in 1859), 12 Stat. 971. The signatories to the treaty were the Quinault and Quileute Tribes.[3] The Government wanted the other neighboring tribes to sign the treaty, but they refused to do so.[4] Nevertheless, after the treaty, the Government treated them as if they had signed the treaty, and patented their lands to settlers (see note 4).

The treaty called for a reservation to be selected by the President. In 1873 the President set aside some 200,000 acres within the Quinaults' territory (see map, frontispiece), and declared that this reservation would be "for the use of the Quinault, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast . . . ." 1 Kapp. 923 (November 4, 1873). The

[2] Another plaintiff is the Quinault Allottees Association, an unincorporated association of Quinault Reservation allottees. The 1,465 individuals today own about 130,000 acres of trust land on the Reservation. The Quinault Tribe today owns approximately 4,000 acres of trust land on the Reservation.

[3] The signatories included the Queets and Hoh, which were subtribes of the Quinault and Quileute, respectively.

[4] The principal other tribes were the Chehalis, Chinook, and Cowlitz Tribes. *See* 8 Ind.Cl.Comm. 436, 441-444, 473 (1960) (Chehalis); 6 Ind.Cl.Comm. 177, 183-195, 207 (1958) (Chinook); 21 Ind.Cl.Comm. 143, 151, 166-170 (1969) (Cowlitz); and see map, frontispiece.

"other tribes of fish-eating Indians" included the Chehalis, Chinook and Cowlitz Tribes.[5]

The Reservation was heavily forested, and for that and other reasons, none of the non-Quinault Indians moved to the Reservation, but continued to live where they always had lived. Consequently, after the Reservation was established, only the Quinaults lived there, as they always had, in the Indian villages of Taholah and Queets.

In 1905, the Government began to allot the Reservation in trust to individual Indians pursuant to the Treaty of Olympia, the Executive Order of 1873, and, especially, the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 348. See also Act of March 4, 1911 ("Quinault Allotment Act"), 36 Stat. 1345 (1911).

By 1933, the Reservation had been completely allotted, with 2,340 trust allotments, usually 80 acres each and heavily timbered. Most of the allottees belonged to the tribes other than Quinault, and were, as stated above, non-residents of the Reservation. Each allottee received a deed, signed in the name of the President of the United States, containing language pursuant to Section 5 of the General Allotment Act to the effect that the United States would hold the allotment for a period of 25 years,

> ". . . in trust for the sole use and benefit of the Indian . . . or, in the case of his decease, of his heirs . . . ."[6]

The trust period was extended indefinitely by Sec. 2 of the Indian Reorganization Act of 1934, 25 U.S.C. § 462.[7]

[5] *Halbert* v. *United States*, 283 U.S. 753 (1931).

[6] 25 U.S.C. § 348; for the full language in the trust patent see *Squire* v. *Capoeman*, 351 U.S. 1, 4 n.6 (1956), involving a plaintiff herein.

[7] The trust relationship with the Quinault Tribe was established by the Treaty of Olympia, 12 Stat. 971. The Tribe acquired some of its trust land pursuant to Sec. 5 of the Indian Reorganization

While the statutory plan contemplated that allottees would take up residence on their allotments and engage in farming or grazing,[8] that was a practical impossibility on the Quinault Reservation due to the heavy forestation. Even today, the great majority of allottees still live off the Reservation, some on other Indian reservations, some in rural or urban non-Indian communities. Approximately one-third of the land on the Reservation has gone out of trust, either through sales to non-Indians or inheritance by persons ineligible to own trust land.[9] As a result, the Reservation today is a complex checkerboard of trust allotments and former trust allotments. Many of the trust allotments are in "heirship status", meaning they are held in undivided ownership by numerous heirs (sometimes hundreds) of the deceased original allottees, often rendering use by any one of the heirs impracticable.

From the time the Reservation was established, the Government exercised complete control over its land and timber. However, it was not until the Act of June 25, 1910, 36 Stat. 857, 25 U.S.C. §§ 406 and 407, that the Secretary of the Interior was authorized to sell Indian timber. Starting in 1920, the Government began to undertake sales of the Quinault allottees' timber, usually under long-term, large-volume contracts made up of many allotments. There have been 14 such contracts since

Act, 25 U.S.C. § 465. The Tribe also acquired some land in trust by express grant from Congress. *See, e.g.*, 76 Stat. 913 (1962), setting aside a tract of land on the Reservation "in trust for the Quinault Tribe of Indians . . . ."

[8] *See* General Allotment Act, Sec. 1, 25 U.S.C. § 331. The assumption that this policy was feasible on the Quinault Reservation was the basis for this Court's decision allowing the allotment of the forested land. *United States* v. *Payne*, 264 U.S. 446, 449 (1924).

[9] Opinion below, reprinted in Govt. Petn. for Certiorari, "Pet. App." 2a. For a more detailed history see *Quinault Allottee Ass'n* v. *United States*, 485 F.2d 1391, 1392-1395 (Ct. Cl. 1973).

1920, one of which (the Crane Creek Unit) is still ongoing, and another of which (the Taholah Unit) was just completed in April, 1979.

The Government, through the Secretary of the Interior and the Bureau of Indian Affairs (BIA),[10] has continuously exercised total control over the management and disposition of the Indians' lands and timber on the Quinault Reservation. The BIA determines which blocks (units) of timber are to be put up for sale.[11] It then obtains a power of attorney from each allottee owning land within the unit (or a resolution from the Tribe in the case of tribal land), after which the BIA handles every detailed aspect of a sale—advertisement for bids, letting of contracts, and supervision of the loggers who build roads, cut the timber, and remove it. After the contract commences, the BIA oversees the scaling and grading of logs, collects the sale proceeds monthly, deducts its fees, and credits the balance to the Tribe's or allottees' BIA accounts. The Indians have nothing to do with the entire operation, except (1) signing the initial power of attorney, and (2) opening the envelope five or ten years later (or more) with their check.[12] Most

[10] 43 U.S.C. § 1457 and 25 U.S.C. § 2.

[11] The Justice Department (Br. 5-6) speaks of the Secretary as being authorized "to consent to the sale of timber by the owner." The reality on the Quinault Reservation has been that the Secretary decided what should be sold and when, and the owner simply signed the power of attorney brought to him.

[12] The BIA's control over Quinault logging operations was described in *United States* v. *Eastman*, 118 F.2d 421, 424 (9th Cir.), *cert. denied*, 314 U.S. 635 (1941), as follows:

> ". . . Departmental regulations and instructions governing in detail the sale of timber on allotted as well as unallotted lands have been in force virtually from the inception of the [1910 Act].
>
> "The trial court thought that [under the 1910 Act] the statutory power of the Secretary was limited to the veto of

allottees have substandard education and do not even know the physical location of their allotments on the Reservation. They are totally reliant upon the Government to manage their timber.[13] Practically none of them earns anything from his allotment, except when the once-in-a-lifetime timber sale occurs.

An Indian owner is not even allowed to cut and sell timber from his own allotment without the permission of the BIA and without posting a bond to assure compliance with the BIA's harvesting regulations.[14] Thus, the trust responsibilities of the Government here are not passive; the BIA has exercised active and total control over the management of the Indians' land and timber,

a sale 'improvident from the standpoint of price.' [31 F.Supp. 761.] But equally important is the exaction of guarantees that the price agreed upon will be paid. Essential also to a provident sale of live timber are provisions for the protection of young growth in the process of logging, stipulations relating to the permissible height of stumps, to the disposition of slashings in such way as to mitigate the fire hazard, and many others. Details of this sort are prescribed at length in the fifty-odd regulations made a part of the present contracts. It is obviously impossible for the Secretary to confer with each allottee concerning the terms and conditions of a proposed contract. He must of necessity promulgate general rules."

[13] *See* Plaintiffs' Exhibits JT-1, at 70-95; VR-1, at 144-148 and 153-159; and BL-1, at 72-89, for a detailed discussion of the allottees' total reliance upon the BIA to manage their timber and the BIA's expectation and encouragement of that reliance

[14] 25 C.F.R. § 141.19 (1979). The impotence of the plaintiffs with respect to the logging of their lands is evidenced in fairly recent litigation. In the late 1950's, congressional hearings revealed that the Government was allowing the loggers credit for improper costs. Due to strong congressional criticism, the Government was prodded into suing the loggers in its capacity as trustee to recover the money for the Indians. *United States* v. *Aloha Lumber Corp.*, No. 3168 (W.D. Wash.); *United States* v. *Rayonier, Inc.*, No. 3169 (W.D. Wash.). The Government, however, ended up settling the lawsuits in 1969 for a fraction of the claim, over the express written protest of the allottees (who had just organized into the Quinault Allottees Association).

and the allottees have always relied upon the BIA to do so.

This case was filed in 1971, three years after the allottees had organized for the first time across tribal lines into the Quinault Allottees Association for purposes of investigating possible acts of mismanagement of their land and timber by the Government and bringing this lawsuit.[15] The many acts of mismanagement alleged are itemized in the opinion below, Pet. App. 2a-3a. The main claims are for failure to obtain adequate prices for the timber sold, and failure to arrange for reforestation after logging.

At the time these claims were filed (1971), the Court of Claims was on record as holding that it had jurisdiction over breach of trust damage claims such as these,[16] and no one questioned this until the Justice Department filed its motion to dismiss on Sep. 30, 1977.

This case has already been the subject of three decisions by the Court of Claims. In the first, *Capoeman* v. *United States*, 440 F.2d 1002 (Ct. Cl. 1971), the court held that the statute of limitations barred a claim by one of the individual plaintiffs but recited that the court had jurisdiction. 440 F.2d at 1002. In *Quinault Allottees Ass'n* v. *United States*, 485 F.2d 1391 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974), the court ruled against the Indians again, and held that the United States was entitled to deduct a management fee from the proceeds of the Quinault allottees' timber sales. The court did not question its jurisdiction. 485 F.2d at 1392.

[15] The suit originated when tribal and allottee leaders approached the general counsel of the Quinault Tribe in 1967 to ask that an investigation be made into rumors that Indian timber was being sold by the BIA for notoriously low prices.

[16] *Klamath and Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966); *Navajo Tribe* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966).

In *Quinault Allottees Ass'n* v. *United States*, 453 F.2d 1272 (Ct. Cl. 1972), the court held that the allottees met the requirements of a class action under its rules. However, it made the case an "opt-in", rather than an "opt-out", class action. Consequently, the 531 then-plaintiffs held regional meetings in the Pacific Northwest and made several mass mailings, followed by voluminous communications back and forth with prospective plaintiffs in order to explain the various claims to them and give them an opportunity to "opt-in" if they wished to join the case. Over 900 additional Indians chose to do so, making a total of 1,465 plaintiffs, which is believed to be a very substantial majority of all potential claimants.

During and after these three partial adjudications, the plaintiffs engaged in discovery for six years, including more than a dozen depositions, extensive searches of Government records, the development of over 20,000 pages of exhibits by plaintiffs (which were turned over to the Justice Department in 1977), and extensive investigation and preparation of reports by numerous expert witnesses in anticipation of trial.[17]

The trial was divided into several phases. The first phase, covering historical and ethnological aspects of the case, was held in Seattle in early 1977, lasting three weeks. Following this trial, the Justice Department filed a motion to dismiss the case for lack of jurisdiction, thereby suspending all further proceedings.[18]

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[17] During 1971-1977, the allottees paid expenses of over $730,000, primarily for the fees and expenses of 12 expert witnesses (attorney time is on a contingent fee basis). These expenses have been paid from a fund derived from a voluntary two percent contribution from the allottees' timber sale proceeds.

[18] The suspension was a serious blow to the momentum and cohesiveness of plaintiffs' team of expert witnesses. In addition, one of plaintiffs' principal expert witnesses, scheduled to testify in the second phase of the trial, has unfortunately died in the interim.

The Court of Claims, sitting *en banc*, denied the Justice Department's motion. Pet. App. 1a-21a (Jan. 24, 1979). The court held that the trust relationship between the Government and the plaintiffs established by the General Allotment Act could "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" because of a proven breach of trust. Pet. App. 6a. The court reasoned that this result was precisely what Congress intended when it passed the Indian Claims Commission Act in 1946, 60 Stat. 1049. Pet. App. 9a-11a.

SUMMARY OF ARGUMENT

The central question is the effect on this case of *United States* v. *Testan*, 424 U.S. 392 (1976). *Testan's* basic teaching is that the Tucker Act, 28 U.S.C. § 1491, does not in itself waive sovereign immunity from a suit for damages. That waiver must be found expressly or impliedly in some other source—the Constitution, a statute, a contract, etc.

We agree, of course, that these plaintiffs must satisfy the principles reaffirmed in *Testan*, and it is clear that they do satisfy them.

By various treaties, statutes, executive pronouncements, and conduct, the United States has undertaken a fiduciary relationship with the Indians of this country. This is true for Indians generally, and it is particularly true for the plaintiffs here because of the General Allotment Act, 25 U.S.C. § 348, under which each plaintiff has an express trust relationship with the United States. This fiduciary relationship carries with it by implication, as a constituent part of the relationship, the liability to respond in damages if the fiduciary duties are breached. This liability could not be sued upon prior to 1946 without a special jurisdictional act because, by statute and judicial

decision, the Tucker Act had been made inapplicable to Indian claims.

However, in 1946 Congress removed that bar, and from then on, Indian breach of trust claims could be filed under the Tucker Act (or under the parallel act applicable to tribal claims, 28 U.S.C. § 1505).

The Justice Department's position is that while Congress lifted the bar to some Indian claims, it did not intend to lift the bar to Indian breach of trust claims. The 1946 Congress would have been very surprised to hear this. The legislative history is plain that breach of trust claims were among those to which Congress was lifting the bar.

Our first line of argument (Section II) is that the legislative history of 28 U.S.C. § 1505 shows an express waiver of sovereign immunity, so that the Court of Claims has jurisdiction over these breach of trust claims under the Tucker Act and 28 U.S.C. § 1505. For example—

> "[S]ection 24 of the bill provides that with respect to all grievances that may arise hereafter Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims, *so it will never again be necessary to pass special Indian jurisdictional acts* in order to permit the Indians to secure a court adjudication on *any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the future.*" 92 Cong. Rec. 5313 (1946) (emphasis added).

And—

> "The Interior Department itself has suggested that it ought not to be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability . . . ." 92 Cong. Rec. 5312 (1946).

Our second line of argument (Section III) is that, entirely aside from the legislative history, waiver of immunity so that suit may be filed under the Tucker Act, is accomplished:

(a) By the fiduciary relationship itself, which implies that the beneficiary may sue for damages for breach of trust;

(b) By various statutes spelling out specific duties of the United States. These duties, such as to insure reforestation after logging, 25 U.S.C. § 466, or to invest Indian moneys, 25 U.S.C. § 162a, carry with them the implied liability to respond in damages if they are improperly discharged;

(c) By the fact that these particular trusts are tantamount to implied contracts, and may be sued upon as such under the Tucker Act under ordinary implied contract jurisdiction.

(d) By the fact that when the Government has possession and control of trust property, a claim for mismanagement of that property is tantamount to a claim for "money improperly exacted or retained," and is cognizable under the Tucker Act without more.

The judgment of the Court of Claims should be affirmed.

ARGUMENT

I. Introduction—The *Testan* Case.

But for *United States* v. *Testan*, 424 U.S. 392 (1976), it is doubtful that the Justice Department would ever have questioned the Court of Claims' jurisdiction to award damages on an Indian breach of trust claim. This jurisdictional question was first resolved by the Court of Claims in 1966 in the Indians' favor, *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483 (1966), and until the Justice Department raised the issue in the instant case in 1977, everyone thought that the matter was settled.[19]

The Justice Department's brief is so filled with references to *Testan* that we feel compelled to address *Testan* briefly before presenting our main arguments. However, this brief discussion will show that there is nothing in *Testan* which undercuts the Court of Claims' jurisdiction over these claims.

Testan did not establish new law; it merely reaffirmed previous law, and applied it to the facts before the Court. It cited with approval *Eastport Steamship Co.* v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967), which held that the waiver of sovereign immunity must be found outside the Tucker Act, and may be found by implication. It was *Eastport* that formulated the "fairly . . . mandating compensation" test approved in *Testan*.

It is true, as the Justice Department says (Br. 15), that there is language in *Testan* to the effect that the waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." [20]

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[19] The Justice Department did half-heartedly contest jurisdiction in the Court of Claims in *Mason* v. *United States*, 461 F.2d 1364 (Ct. Cl. 1972), but dropped the issue on review in this Court, 412 U.S. 391 (1973).

[20] 424 U.S. at 400, citing *United States* v. *King*, 395 U.S. 1, 4 (1969).

However, it is obvious that this language overstates the proposition, and was merely dicta if applied to situations other than the one addressed in *King*. The *King* case dealt with the question of whether the Court of Claims has jurisdiction to grant declaratory judgments. It was not unreasonable for this Court, in rejecting that proposition, to say that the grant of such extraordinary jurisdiction "cannot be implied but must be unequivocally expressed." But it would not be correct to apply the same language, for example, to the question of whether the court had jurisdiction to award compensation for Fifth Amendment takings, *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933), or for denial of emoluments of a civil service position lawfully held, *United States* v. *Wickersham*, 201 U.S. 390, 399 (1906), both of which are causes of action against the United States allowed by implication.

This Court in *Testan* was well aware that waivers of sovereign immunity may be found by implication. Not only did it refer to the *Jacobs* and *Wickersham* cases, 424 U.S. at 401 and 402, but it specifically approved language in *Eastport* to the effect that waiver may be found by implication. We believe that the following language in *Testan* is the governing language:

> ". . . entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl., at 607, 372 F.2d, at 1009; *Mosca* v. *United States*, 189 Ct. Cl. 283, 290, 417 F.2d 1382, 1386 (1969), cert. denied, 399 U.S. 911 (1970). We are not ready to tamper with these established principles . . . ." [21]

and

> ". . . the basis of the federal claim—whether it be the Constitution, a statute, or a regulation—does

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[21] 424 U.S. at 400.

not create a cause of action for money damages unless, as the Court of Claims has stated, that basis in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. *Eastport S. S. Corp.* v. *United States*, 178 Ct. Cl., at 607, 372 F.2d, at 1008, 1009." [22]

The plaintiffs' claims are "fairly mandated" by the legislative history of 28 U.S.C. § 1505, the existence and nature of the trust relationship, and the numerous statutes spelling out the Government's fiduciary duties, see Sections II and III below. These claims meet every requirement set forth in *Testan* and its predecessor cases such as *Eastport*.

II. These Breach of Trust Claims Can Be Brought Under Section 24 of the Indian Claims Commission Act, 28 U.S.C. § 1505, Because This Is What Congress Clearly Intended When It Passed the Act.

In enacting Section 24 of the Indian Claims Commission Act (now 28 U.S.C. § 1505) in 1946, Congress waived sovereign immunity for Indian breach of trust damage claims, and intended that these claims could be filed thereafter in the Court of Claims without the necessity of further jurisdictional acts. The legislative history of this Act and the relevant case law make it clear that the Government's general fiduciary duty to Indians is a sufficiently definite and enforceable duty that an allegation of its breach states a good cause of action under 28 U.S.C. § 1505. Section 1505 provides:

"The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

[22] 424 U.S. at 401-402.

A. *The General Fiduciary Duty of the United States to Indians.*

The United States has a fiduciary responsibility to the Indians within its borders, including these plaintiffs. This responsibility has been recognized repeatedly by the Congress, the Executive and the Judiciary, from the earliest days of the Republic to the present.[23]

1. *Congressional Recognition of the Fiduciary Duty.*

The first congressional recognition of the Government's fiduciary duty to Indians was in the Northwest Ordinance of 1787,[24] ratified by the First Congress in 1789, 1 Stat. 50. Article III provided that:

"The utmost good faith shall always be observed toward the Indians . . . and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them . . . ."

[23] Good general reviews of the trust relationship appear in Letter, Solicitor of the Interior Dept. Krulitz to Assistant Attorney General Moorman, Nov. 21, 1979 (reprinted in our Appendix hereto, pp. 1a-20a); Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213 (1975); and *Final Report of the American Indian Policy Review Comm.*, 125-138 (1977).

[24] The Northwest Ordinance was made applicable to the Oregon Territory, which included the lands now comprising the Quinault Reservation. 9 Stat. 323, Sec. 14 (1848).

Another early recognition was the Indian Non-intercourse Act of 1790, 1 Stat. 137, 25 U.S.C. § 177. A recent court has held that this Act—

> ". . . imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act . . . ." *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 379 (1st Cir. 1975).

More recently, Congress in the Indian Self-Determination Act, 88 Stat. 2203 (1975), 25 U.S.C. § 450a(b)—

> ". . . declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people . . . ."

Congress referred to the fiduciary relationship in the Indian Claims Commission Act itself. 60 Stat. 1049 (1946), 25 U.S.C. § 70 *et seq.* Section 24 granted jurisdiction to the Court of Claims to hear post-1946 claims, and added this proviso:

> "Provided, however, that nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups." [25]

This trust relationship has been recognized by Congress with respect to these very plaintiffs. The Treaty of Olympia, 12 Stat. 971 (1859), declared in Article VIII that—

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[25] 60 Stat. at 1055-6. This proviso was explained as "indicating that the substantive relations [of long standing] between the United States and the several tribes" were not intended to be altered. *Hearings on H.R. 1198 and 1341 Before House Comm. on Ind. Affairs*, 79th Cong., 1st Sess. 127 (1945).

> "The said tribes and bands acknowledge their dependence on the government of the United States . . . ."

Furthermore, Article IV of the treaty provided that the United States would pay the Indians $25,000 for the cession of their land, but they were not allowed to receive the cash; rather, the money was to "be applied to the use and benefit of the said Indians under the direction of the President . . . ."

2. *Judicial Recognition of the Fiduciary Duty.*

This Court has spoken many times of the Government's trust relationship with the Indians. In *Cherokee Nation* v. *Georgia*, 30 U.S. 1, 17 (1831) (Marshall, C. J.), this Court stated:

> ". . . [The United States' and the Indians'] relation resembles that of a ward to his guardian."

In *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942), the Court said:

> "Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it [the Government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

In *United States* v. *Payne*, 264 U.S. 446 (1924), a case involving a Quileute Indian (some of whose descendants are plaintiffs), this Court said:

> "They are an unlettered people, unskilled in the use of language, *Jones* v. *Meehan*, 175 U.S. 1, 10-11, with regard to whom the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable

consideration to discharge its trust with good faith and fairness."

In *Squire* v. *Capoeman*, 351 U.S. 1, 2 (1956), involving a Quinault Indian (and a plaintiff herein), this Court referred to the "Government's role as respondent's trustee and guardian." More recently, in *United States* v. *Mason*, 412 U.S. 391, 398 (1973), involving a breach of trust claim under the Osage Allotment Act, this Court stated:

> "There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians, and that, as such, it is duty bound to exercise great care in administering its trust."

3. *Executive Recognition of the Fiduciary Duty.*

Presidents too have recognized the relationship. Speaking of the Indian Nonintercourse Act of 1790, President George Washington said:

> ". . . you will perceive, by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians." Quoted in *Seneca Nation* v. *United States*, 173 Ct. Cl. 912, 924 (1965) (emphasis omitted).

In a major message to Congress on Indian affairs in 1970, President Richard Nixon spelled out the basis of the trust relationship:

> "This policy of forced termination [of the trust relationship] is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. *The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government.* Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.
>
> This goal, of course, has never been achieved. *But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.* To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American." [26]

In 1976, President Gerald Ford, addressing an Indian delegation, stated that:

> "The Federal Government has a very unique relationship with you and your people. It is a relationship of a legal trust and a high moral responsibility." [27]

In 1978, President Jimmy Carter stated that:

> "I consider it my solemn duty and obligation as President to see that we fulfill our trusteeship responsibilities within the framework of self-determi-

[26] H. Doc. No. 91-363, reprinted at 116 Cong. Rec. 23258 (July 8, 1970) (emphasis added).

[27] Press release, the White House, July 16, 1976.

nation for American Indians. In particular, I would like to reaffirm my resolve to honor this country's legal and moral responsibilities to American Indians in protecting their land, water and natural resources." [28]

The Government's trust responsibility is well summarized in a lengthy legal analysis from the Solicitor of the Interior Department to the Justice Department, dated November 21, 1978, reprinted in full in the Appendix hereto. The Solicitor concluded (App. 2a) that:

> "1. There is a *legally enforceable* trust obligation owed by the United States Government to American Indian tribes. This obligation originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements and statutes pertaining to Indians." (Emphasis added).

B. *The Express Fiduciary Duty to These Plaintiffs.*

The Government has a fiduciary relationship with the plaintiffs not only because of the general fiduciary duty to Indians, but expressly because of Section 5 of the General Allotment Act of 1887, 25 U.S.C. § 348, and other statutes, see notes 6 and 7. This fact is not disputed by the Justice Department and need not be further belabored.

C. *The Situation With Respect to Indian Claims Prior to the Indian Claims Commission Act of 1946.*

The foregoing declarations of fiduciary obligation are all very well, but what happens when the Government breaches that obligation to the Indians' detriment? Can the Indians go to court and sue the trustee, the United States, for damages?

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[28] Message from the White House to Delegates of the National Congress of American Indians, August 30, 1978.

Prior to 1946, Indian tribes could not sue the United States, even on the most obvious and commonplace cause of action (*e.g.*, failure to keep treaty promises, or a taking without just compensation), unless they obtained a special jurisdictional act from Congress.[29] This was difficult and time-consuming [30] and, in many cases, when the Indians got an act and went to the Court of Claims, the court construed its jurisdiction under the act so strictly that the Indians either received a small award or were dismissed altogether and had to go back to Congress for another try.[31]

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[29] This was partly because of 12 Stat. 765, § 9 (1863) (which deprived the Court of Claims of jurisdiction over claims arising from Indian treaties) and partly because of the holdings of the Court of Claims. *See, e.g., Choctaw and Chickasaw Nations* v. *United States*, 75 Ct. Cl. 494, 499 (1932); *see also* H.R. Rep. No. 1466, 79th Cong., 1st Sess., 2 n.2 (1945). The legislative history of the Indian Claims Commission Act of 1946 reveals repeated references to the requirement of special jurisdictional acts in order to litigate Indian claims. *See, e.g., Hearings on H.R. 7837 Before the House Comm. on Indian Affairs*, 74th Cong., 1st Sess., 5-9 (1935) (statement of John Collier, Commissioner of Indian Affairs); *Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess., 113-115 (1945) (statement of Harold Ickes, Secretary of the Interior).

[30] An example of delay is detailed in Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 Geo. L. J. 511 (1966). The Turtle Mountain Chippewas tried for many years to get a special jurisdictional act after being forced into a cession for an extremely unfair price in 1904. In 1928 the Senate finally approved a bill, but the House did not concur until 1934. President Roosevelt vetoed the bill in 1934, and then vetoed a revised bill. Further efforts were never fully successful and, finally, the claim was filed under the Indian Claims Commission Act of 1946. As of September 1979, the case is still being litigated, having had several trials and appeals. Another trial is pending on one phase of the case, and an appeal is pending on another.

[31] Between 1881 (the year of the first claim) and 1946, almost 200 claims were filed in the Court of Claims under special acts. Only 29 received awards. The bulk of the rest were dismissed on technicalities. *Final Report of the Indian Claims Commission* 3

Most of the pre-1946 claims were land claims—*i.e.*, claims for damages where land was taken without any payment [32] or for inadequate payment,[33] and often the court would refer to breach of the fiduciary duty as a basis for recovery.[34] A few claims were for mismanagement of assets (breach of trust),[35] and at least one was for breach of trust in turning over tribal funds to a tribal government known to be corrupt.[36] However, all of these claims required a special jurisdictional act, until the Indian Claims Commission Act was passed.[37]

Equitable relief (*i.e.*, injunction and declaratory judgment) was available in federal district courts to enforce the trust responsibility, at least in certain situations.[38]

(1978); *see also Wilkinson*, note 30 *supra*, showing a rate of recovery on Indian claims of only 7 percent of the amounts claimed, not even counting zero recovery cases.

[32] *See, e.g., Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308 (1930).

[33] *See, e.g., Klamath and Modoc Tribes* v. *United States*, 304 U.S. 119 (1938).

[34] *See, e.g., United States* v. *Mille Lac Band*, 229 U.S. 498, 509-10 (1913); *United States* v. *Creek Nation*, 295 U.S. 103, 109-10 (1935).

[35] *See, e.g., Navajo Tribe* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966) (mismanagement of mineral assets) (suit based in part on special jurisdictional act); *Menominee Tribe* v. *United States*, 101 Ct. Cl. 22 (1944) (mismanagement of timber).

[36] *Seminole Nation* v. *United States*, 316 U.S. 286 (1942).

[37] It is interesting to note that by the time the Indian Claims Commission expired in 1978, it had awarded some $818,000,000 to Indian tribes, mostly in compensation for pre-1946 land claims. *Final Report of the Indian Claims Commission* 125 (1978). That figure is about the same as the estimated $800,000,000 that the United States paid the Indians through various treaties and agreements for 90 percent of the public domain. *Id.* at 5. The combined total is less than the cost of two Trident submarines. Cong. Rec. S12599 (Sep. 14, 1979).

[38] In *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919), this Court enjoined the Secretary of the Interior from disposing of the tribe's land under the general public land laws. *See also Cramer* v. *United States*, 261 U.S. 219 (1923). However, in 1941 when the plaintiffs in this case (or their predecessors) sought to enjoin the Secretary from mismanaging their timber, the Ninth Circuit Court of Appeals dismissed the case as one against the sovereign who had not waived immunity. *United States* v. *Eastman*, 118 F.2d 421 (9th Cir.), *cert. denied*, 314 U.S. 635 (1941).

However, this relief is generally prospective only, and obviously not capable of remedying irreversible wrongs such as failing to obtain a fair price for timber. For the latter, only money damages will make the Indians whole, and for this a special jurisdictional act was necessary prior to 1946.

In summary, when Congress began to consider the Indian Claims Commission Act in 1945 [39] the Government's fiduciary duty to Indians was well recognized, but the Tucker Act was inapplicable to Indians, so that Indian damage claims required special jurisdictional acts.

D. *The Legislative History of Section 24 of the Indian Claims Commission Act (Now 28 U.S.C. § 1505).*

In 1946 Congress passed the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* The purpose was twofold: (1) to give tribes their day in court on old claims previously barred, and (2) to remove the bar as to future claims. The second purpose was accomplished in Section 24 which is now codified as 28 U.S.C. § 1505, and is quoted at p. 13-14 above.

The legislative history of Section 24 clearly manifests Congress' desire to end the need for special jurisdictional acts for Indian breach of trust claims. Congressman (now Senator) Henry M. Jackson, the principal sponsor of the bill in the House, stated:

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[39] Actually, Congress had been considering the Indian Claims Commission concept since at least 1928. *See Final Report of Indian Claims Commission* 3 (1978). However, the main legislative history took place in 1945-1946.

"[S]ection 24 of the bill provides that with respect to all grievances that may arise hereafter Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims, *so it will never again be necessary to pass special Indian jurisdictional acts* in order to permit the Indians to secure a court adjudication on *any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the future.*" [40]

Congress was also aware of the varied nature of Indian claims, recognizing that: "All sorts of agreements have been made concerning the use and disposition of these [Indian] funds and promising protection of the lands retained by the Indians." [41] Indeed, in describing the nature of Indian claims, Congress specifically referred to a timber mismanagement claim of the Menominee Indians for which a special jurisdictional act had been enacted, and which had been found by the court to be a valid claim.[42] Congress observed:

"If we fail to meet these obligations by denying access to the courts *when trust funds have been improperly dissipated or other fiduciary duties have been violated*, we compromise the national honor of the United States." [43]

Congress recognized that unless Indians were given the right to sue the Government for mismanagement of their trust funds and property, there would continue to be

". . . encourage[ment of] bureaucratic disregard of the rights of Indian citizens by a small minority of

[40] 92 Cong. Rec. 5313 (1946) (emphasis added). *See also Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess., 148-149 (1945).

[41] H.R. Rep. No. 1466, 79th Cong., 1st Sess., 4 (1945).

[42] *Id.*

[43] *Id.*

governmental officials who are comforted by the thought that there is no judicial redress available to the victims of their maladministration . . . ." [44]

Congressman Jackson stressed the importance of this fact as a reason to provide Indians with access to the courts:

"*The Interior Department itself has suggested that it ought not be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability* . . . .

[L]et us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed." [45]

Felix S. Cohen, then Associate Solicitor for the Interior Department and an acknowledged expert on Indian law, submitted comments to Congress on behalf of the Interior Department. Those comments with respect to Section 24 stated:

"[*I*]*t may be expected that future transactions with the Indians will at times give rise to additional claims*, the same as in the case of other parties who believe that they have been dealt with unjustly by the Government. The new section [24] here proposed would correct this situation by permitting the Court of Claims to take cognizance of Indian tribal claims accruing subsequent to the enactment of the bill." [46]

The House report summarized the purpose of the Indian Claims Commission Act very succinctly as follows:

[44] *Id.*

[45] 92 Cong. Rec. 5312 (1946) (emphasis added).

[46] *Hearings on H.R. 1198 and H.R. 1341 Before the House Comm. on Indian Affairs*, 79th Cong., 1st Sess., 130 (1945) (emphasis added).

"[T]he statutory prohibition against litigation in the Court of Claims growing out of agreements with Indian tribes would be lifted and the Indian would henceforth have the same right as his white or black neighbor to secure a full and free hearing in the Court of Claims, or any other appropriate tribunal, *on any controversy with the Federal Government that may arise in the future.*" [47]

The Justice Department (Br. 32) contends that Congress never intended in 1946 to create a cause of action for breach of trust. We agree that no breach of trust claim had been brought by any tribe prior to 1946 without a special jurisdictional act. However, it is quite clear that Congress in the language quoted above was saying that from 1946 on, the Government, as trustee, must account for its handling of Indian trust property, which means it must pay damages if it has breached its fiduciary duties to the detriment of the Indians.[48] We discuss this point more fully in Section III below.

Thus, Congress in passing Section 24 of the Indian Claims Commission Act clearly intended to give "Indian tribes, bands, and other identifiable groups of American Indians",[49] from 1946 onward, the right to sue the

[47] H.R. Rep. No. 1466, 79th Cong. 1st Sess., 3 (1946) (emphasis added).

[48] We note that the Court of Claims has construed the 1946 legislative history narrowly, and limited the right to an accounting to instances where the Indians have first proven actual wrongdoing by the Government. In other words, even under 28 U.S.C. § 1505 the Indians have no right to a general accounting. *Klamath and Modoc Tribes* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966). The Court of Claims has also held that the United States does not bear the usual trustee's duty to pay interest on damages for breach of trust, unless a statute specifically so requires. *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976).

[49] The Justice Department may argue that the 1,465 individual allottees who are plaintiffs here do not comprise a "tribe, band, or

United States in the Court of Claims to the same extent as other citizens, and it intended that damage claims involving mismanagement of trust funds and property were to be within the ambit of the court's jurisdiction. Indeed, if such cases were not within the court's jurisdiction, very few damage claims could be brought today, since as Congress well knew, all of the old treaty claims have been or will soon be resolved, and the principal activity of the Government since 1946 capable of generating claims has been the performance of its role as manager of trust property.[50]

E. *The Justice Department's Argument Regarding the Purpose of 28 U.S.C. § 1505 is Specious.*

The Justice Department argues in a long footnote (Br. 12-15 n. 5) that the purpose of the Indian Claims Commission Act was simply to give Indians the same right to sue the United States as non-Indians. Therefore, Justice argues, Section 1505 is not in itself a waiver

identifiable group" so as to be eligible to file a claim under 28 U.S.C. § 1505. This is not correct. The allottees have, in effect, *already* been treated by both the Government itself and the Court of Claims as an "identifiable group" of Indians. The Government so treated them when it issued allotments on the Quinault Reservation to the ancestors of the plaintiffs pursuant to the Treaty of Olympia, the Executive Order of 1873, the General Allotment Act, and the Quinault Allotment Act of 1911 (see p. 3 *supra*), treating them as one group. The Court of Claims similarly has effectively found the allottees to be an "identifiable group" by virtue of its class action decision in this case which recognized the facts of the allottees' contiguous ownership of allotments on the Quinault Reservation and the Government's common management thereof. *See Quinault Allottee Ass'n* v. *United States*, 453 F.2d 1272, 1276 (Ct. Cl. 1972). *See also Coast Indian Community* v. *United States*, 550 F.2d 639 (Ct. Cl. 1977); *Thompson* v. *United States*, 122 Ct. Cl. 348, *cert. denied*, 344 U.S. 856 (1952). In any event, as Section III of our argument shows, the individual allottees can file claims under the Tucker Act, as the Court of Claims held below.

[50] The Court of Claims recognized that breach of trust claims were expected by Congress in 1946 to be perhaps the "main grist" of the courts. Pet. App. 11a n.16.

of sovereign immunity because the Tucker Act, which Section 1505 tracks, is not in itself a waiver of sovereign immunity.

We agree, of course, that the Tucker Act is not in itself a waiver of sovereign immunity. This has long been the law. But Section 1505 *is* a waiver of sovereign immunity, and the waiver was the very purpose for its passage. Until the Indian Claims Commission Act was passed, Indians were barred by sovereign immunity from suing the United States for damages. Section 1505 lifted this bar for post-1946 claims, provided only that the Indians have a claim which arises "under the Constitution, laws or treaties of the United States, or Executive orders of the President . . . ." In this respect Section 1505 gives Indian tribes and groups something that others do not have: the right to sue the United States for damages on claims arising from the laws or treaties of the United States, without any necessity that such laws or treaties imply within themselves a waiver of sovereign immunity. The waiver is directly granted by Section 1505. Or, put another way, the legislative history of Section 1505 supplies what *Testan* holds is missing from the Tucker Act.

To hold that these Indians must return to Congress to seek another waiver of sovereign immunity would place them in the same position as if Congress had never passed Section 1505. Justice's argument can be accepted only if the legislative history of Section 1505 is ignored.

III. These Breach of Trust Claims Can Be Brought Under the Tucker Act, 28 U.S.C. § 1491, Because There Are Independent Sources for Waiver of Sovereign Immunity.

We have shown in Section II above that when Congress passed the Indian Claims Commission Act, it not only lifted the previous barrier against Indian claims, but in doing so made clear that it intended claims such as the instant one to be cognizable after 1946. We believe this is conclusive of this case.

However, the Justice Department (Br. 12) argues that because of *Testan*, plaintiffs still must show that the statute under which the trust relationship arose (the General Allotment Act) expressly or impliedly subjects the Government to suit for damages in event of breach of trust. We agree that a waiver of sovereign immunity must be shown, and we believe it is shown by the General Allotment Act. However, it need not be shown by the General Allotment Act; it may be shown by another statute (such as 28 U.S.C. § 1505, discussed in Section II), or by any other proper source, as we discuss in this Section. Consequently, these plaintiffs' claims are cognizable under the Tucker Act pursuant to waiver impliedly granted by the General Allotment Act, and/or the other sources discussed.

The Tucker Act, 28 U.S.C. § 1491, provides:

> "The Court of Claims shall have jurisdiction to render judgment on any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Of course, *Testan* teaches that the Tucker Act itself is not a waiver of sovereign immunity, and the waiver, if one exists, must be found in independent sources. We believe that the necessary waiver in the instant case can be found by implication in independent sources:

a. The express trust created by statute implies a waiver of immunity.

b. The statutes spelling out management duties of the trustee imply a waiver of immunity from suit for damages for breach of those duties.

c. The facts of this case make out a contract, and any contract with the Government grants by implication a waiver of immunity.

d. The Government's mismanagement of trust assets falls into the "money improperly exacted or retained" class, which automatically receives a waiver of immunity.

We will discuss these sources in order.

A. *When Congress Intentionally Establishes an Express Trust Relationship with Indians, It Impliedly Subjects the Government to Suit for Damages Under the Tucker Act in the Event the Government Breaches Its Trust Duties.*

We submit that when Congress intentionally creates an express trust with an Indian or Indian tribe (or with anyone else for that matter), it creates an undertaking that impliedly includes as one of its incidents the liability to pay damages in the event of breach of the terms of the trust. The right to sue for damages is a substantive right impliedly conferred by the statute creating the trust, and is therefore cognizable under the Tucker Act. The plaintiffs here are all beneficiaries of express trusts specifically naming them, see notes 6 and 7 above.

We find the express trust situation difficult to distinguish from the express contract situation. In the case of an express contract, there is no need for the contract to spell out that if the United States breaches its undertaking it can be made to pay damages, because that is one of the fundamental elements of the contract itself, so fundamental it goes without saying. Without such liability the contract is not a contract. The courts have never, to our knowledge, questioned their jurisdiction under the Tucker Act to award damages against the United States for breach of contract simply because the contract does not expressly spell out a substantive right

of damages for breach,[51] nor did *Testan* make any such suggestion.

The reason, we submit, is that when the Government contracts to do something, that constitutes a distinct, "anchored" obligation [52] to a distinct contracting party, and the fears apparently implicit in *Testan* of creating claims of unknown scope for unknown persons based merely upon congressional policies do not apply. Therefore, the substantive right to sue the United States for damages for breach of contract (*i.e.*, the waiver of sovereign immunity) is implicit in every contract with the United States.[53]

We believe the case of an express trust is indistinguishable. In such a case the United States has made a distinct undertaking to a distinct beneficiary to take care of distinct trust property, very similar to its undertaking when it enters into a contract. It is fundamental to the very trust relationship itself that the beneficiary be able to sue the Government for damages if the Government breaches its trust undertaking.[54] This substantive right does not have to be spelled out in the trust

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[51] None of the many Government contracts of which we are aware expressly waives sovereign immunity in event of breach.

[52] The Justice Department's brief frequently repeats the phrase "unanchored judge-created principles of fiduciary law." Br. 7 n.2, 10, 11, 30, 31, 33. We do not see the relevance.

[53] Of course, the Tucker Act expressly allows breach of contract claims, but as *Testan* teaches, that merely grants the forum, not the substantive right. Many contract claims are brought under the Tucker Act to recover damages other than for breach of promise to pay money (*e.g.*, delay damages), so it would not be correct to say that jurisdiction over contract claims, like jurisdiction over Fifth Amendment claims, is simply a matter of the contract's self-executing aspects. *See Jacobs* v. *United States*, 290 U.S. 13 (1933); *see also Testan*, 424 U.S. at 401.

[54] *See Restatement (Second) of Trusts* § 25 (1959); "[N]o trust is created unless [the settlor] manifests an intention to impose duties which are enforceable in the courts." *See also id.* at § 205.

instrument, any more than it does in a contract. It is implied, just as it is in a contract.

B. *Statutes Specifying the Government's Management Duties Imply a Right to Sue for Damages Under the Tucker Act.*

Even though the express trust relationship established by the General Allotment Act should be sufficient to support jurisdiction under 28 U.S.C. §§ 1491 and 1505, as the Court of Claims found, we would note that the plaintiffs are also suing under other statutes which, in themselves (especially in combination with the trust relationship) could support jurisdiction. We agree entirely with the Court of Claims that these statutes and regulations "furnish statutory directives—substantive rules of conduct—which help to determine the obligations and undertakings of the Federal Government as trustee" (Pet. App. 13a), but we also believe that these statutes furnish an independent implied waiver of sovereign immunity. We will, therefore, briefly summarize the principal ones in relation to our claims.

1. *25 U.S.C. § 466.*

One of the plaintiffs' major claims is that the Government failed to manage their timber in compliance with 25 U.S.C. § 466. This statute is part of the Indian Reorganization Act of 1934, which provides for the management of Indian forests on a sustained yield basis. In enacting this requirement, Congress heard testimony from Commissioner of Indian Affairs John Collier that:

> "[T]here must be a constructive handling of Indian timber. We have got to stop the slaughtering of Indian timber lands, to operate them on a perpetual yield basis *and the bill expressly directs that this principle of conservation shall be applied throughout.*" [55]

Collier pointed out:

> "The declaration that sustained yield shall be practiced in the forests is very important. *It is a direction.*" [56]

He went on to discuss an earlier attempt by Congress to apply this principle to the timberlands of the Menominee Tribe. Unfortunately, the principle set forth

> ". . . was not followed by the Department. Much of their timber was devastated, *and, as a result, they have a claim against the Government, an assertable and collectable claim,* that they were protected by a specific direction from Congress that the timber should be operated on a perpetual yield basis. The other tribes are entitled to similar protection." [57]

The regulations of the Interior Department promulgated pursuant to 25 U.S.C. § 466 embellished the meaning of "sustained yield." The 1949 regulations,[58] which are essentially unchanged today,[59] required preserving Indian forest lands in a perpetually productive state, no clear-cutting of large contiguous areas, making ade-

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[55] *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs,* 73d Cong., 2d Sess., Pt. 2, 35 (1934) (emphasis added).

[56] *Id.*; Pt. 4, at 131 (emphasis added).

[57] *Id.* (emphasis added). The Menominees later did indeed prevail upon their claim that the Government failed to manage their forest on a sustained yield basis. *Menominee Tribe* v. *United States,* 117 Ct. Cl. 442 (1950).

[58] Plaintiffs' Exhibit DT 3.3-2.1. The first regulations under this statute were promulgated in 1936 (DT 3.3-1.3) and were incorporated essentially verbatim into the 1949 C.F.R., which was in effect when the current and just-completed logging contracts at Quinault were negotiated between the BIA and the contractors.

[59] *See* 25 C.F.R. Pt. 141 (1979).

quate provision for new growth when mature timber is removed, regulation of cutting so as to have continuous production and a perpetual forest business, etc.[60]

Plaintiffs believe that the evidence in this case will show that the Government violated the foregoing statute and regulations, causing direct and substantial loss to the plaintiffs, in that in some areas on the Reservation there is no timber growing even though logging was completed many years or even decades ago.

Plaintiffs submit that 25 U.S.C. § 466 implicitly permits the Court of Claims to award compensation to them for their losses flowing from violations of 25 U.S.C. § 466 and the regulations issued pursuant thereto.

2. *25 U.S.C. §§ 406 and 407.*

The United States was authorized as trustee to sell Indian timber from allotted and unallotted trust lands by virtue of the Act of June 25, 1910, 25 U.S.C. §§ 406 and 407.[61] Detailed regulations implementing these statutes first appeared in 1911, recognizing that the BIA's duty under the 1910 Act entailed:

> ". . . so managing the Indian forests as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests."[62]

The 1911 regulations were revised from time to time and today appear in Title 25 of the Code of Federal

[60] 25 C.F.R. §§ 61.1 and 61.3 (1949) (DT 3.3-2.1).

[61] When Congress passed the Act, it did so partly in recognition of the fact that "in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment." H.R. Rep. No. 1135, 61st Cong., 2d Sess., 3 (1910).

[62] Plaintiffs' Exhibit DT 3.3-1.1, at 4. Even the Government officers admit that they were required to obtain fair market value for the plaintiffs' timber.

Regulations.[63] Although there are detailed regulations regarding the Bureau of Indian Affairs' forest management included within its own Indian Affairs Manual,[64] the overall regulations still appear annually in 25 C.F.R., covering essentially the same details as the 1911 regulations.

Plaintiffs believe that the evidence in this case will show that the Government violated the foregoing statutes and regulations by, for example:

(a) Failing to obtain fair market value for the plaintiffs' timber through pricing and scaling practices which did not meet the Government's own regulations;

(b) Failing to obtain any compensation at all for some of the plaintiffs' merchantable timber, due to poor scaling practices which failed to meet the Government's own regulations; and

(c) Charging improper and excessive costs against the plaintiffs' stumpage payments, due in part to nonadherence to the Government's own regulations.

Plaintiffs submit that Section 406 and 407 implicitly permit the Court of Claims to award compensation for losses flowing from violations of the implied directive of those statutes and the regulations issued pursuant thereto, that the Indians shall be paid fair market value for their timber.

3. *25 U.S.C. § 413.*

The Government was authorized by virtue of the Act of February 14, 1920, 41 Stat. 415, 25 U.S.C. § 413, to deduct reasonable fees from Indian timber sale proceeds to cover the cost of the management and sale of the Indians' timber. Following the congressional authoriza-

[63] 25 C.F.R. Pt. 141 (1979).

[64] Plaintiffs' Exhibit DT 19.4-1.1 and 19.4-1.2.

tion to charge "reasonable fees," the Interior Department set forth in its regulations the rate of such fees and what they were intended to cover. The regulations first appeared in 1924, were included in the 1927 [65] and 1936 [66] revisions, and stated as follows in 25 C.F.R. § 61.25 (1949): [67]

> "In all sales of timber from either allotted or unallotted land a sufficient deduction will be made from the gross proceeds to cover the cost of examining, supervising, advertising, collecting, disbursing, accounting, marketing, scaling, caring for slash, and protecting from fire the timber and young growth left standing on the land being logged or upon adjacent land. . . ."

Plaintiffs believe that the evidence in this case will show that the administrative fees deducted from their timber sales proceeds have not in fact been reasonable as Congress directed, *but have grossly exceeded the BIA's own stated costs* (see note 76 below). Moreover, some of the items included as costs by the Government are improper or duplicative of costs which the loggers were supposed to bear.

Plaintiffs submit that Section 413 implicitly permits the Court of Claims to refund to them those fees which have not been earned under that statute and the regulations issued thereunder.

4. *25 U.S.C. §§ 318a and 323 through 325.*

Under the Act of February 5, 1948, 62 Stat. 17, the relevant portions of which are codified in 25 U.S.C. §§ 323 through 325, Congress authorized the Secretary of the Interior to grant rights-of-way for all purposes

[65] Plaintiffs' Exhibit DT 3.3-15.

[66] Plaintiffs' Exhibit DT 3.3-1.3.

[67] Plaintiffs' Exhibit DT 3.3-2.1.

across Indian trust land, provided that he paid such compensation as he deemed just. Pursuant to this statute, regulations have been promulgated requiring the issuance of revocable permits for logging roads upon fair and adequate terms,[68] fair compensation to the Indian landowner therefor,[69] and restoration of right-of-way land to original condition as nearly as possible.[70]

Plaintiffs believe that the evidence in this case will show that the Government violated these statutes and regulations by:

(a) Failing to obtain fair market value in selling certain rights-of-way; [71]

(b) Charging the allottees for road maintenance costs on public or BIA roads; and

(c) Failing to require the restoration of certain rights-of-way to original condition.

Plaintiffs submit that Sections 318a and 323 through 325 implicitly permit the Court of Claims to award compensation to them for their losses flowing from violations of those statutes and regulations issued thereunder.

5. *25 U.S.C. § 162a.*

Under the Act of June 24, 1938, 52 Stat. 1037, 25 U.S.C. § 162a,[72] the Secretary of the Interior was given authority to invest tribal and individual Indian funds in

[68] *See, e.g.*, 25 C.F.R. § 256.66 (1949) (DT 3.3-2.1).

[69] *See, e.g.*, 25 C.F.R. §§ 256.69, 256.75, and 256.82 (1949) (DT 3.3-2.1); 25 C.F.R. §§ 161.12 and 161.13 (1979).

[70] *See, e.g.*, 25 C.F.R. § 161.7(d) (1958) (DT 3.3-2.2); 25 C.F.R. § 161.5(d) (1979).

[71] *See Coast Indian Community* v. *United States*, 550 F.2d 639, 653 (Ct. Cl. 1977). The evidence may in fact reveal that in some cases roads were effectively taken for public use without payment of just compensation in violation of the Fifth Amendment.

[72] This Act amended the Act of May 25, 1918, 40 Stat. 591.

banks, bonds, notes or other public debt obligations of the United States if deemed advisable and for the best interest of the Indians.[73] The courts have said the Government is liable under this statute for failure to obtain going rates of interest on invested trust funds. *Cheyenne-Arapaho Tribes* v. *United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975); *Manchester Band of Pomo Indians* v. *United States*, 363 F. Supp. 1238, 1243-44 (N.D. Cal. 1973).

Plaintiffs believe that the evidence in this case will show that the Government paid no interest on some of plaintiffs' funds, and an unreasonably low rate of interest on other of plaintiffs' funds.

Plaintiffs submit that Section 162a implicitly permits the Court of Claims to award compensation to them for their losses flowing from violations of that statute and the regulations issued thereunder.[74]

C. *The Express Trusts Involved Here Are Contracts, and Breach Thereof Creates a Claim Traditionally Under the Tucker Act.*

We believe that the facts of the trust relationship in this case meet the requirements of an implied contract under the Tucker Act.[75] Obviously, an express right to sue the Government need not be present in an im-

[73] The Act of April 30, 1934, 48 Stat. 647, 25 U.S.C. § 372, amended the Act of June 25, 1910, 36 Stat. 855, covering the sale of Indian timber, to authorize the BIA to deposit tribal and individual Indian monies coming into its hands in banks.

[74] Where "the Government has the citizen's money in its pocket," a suit to recover such money can clearly be brought. *Eastport Steamship Corp.* v. *United States*, 372 F.2d at 1007-08.

[75] This, of course, refers to implied-in-fact as opposed to implied-in-law contracts. *See United States* v. *Minnesota Mut. Inv. Co.*, 271 U.S. 212, 217 (1926).

plied contract because there is no actual contract underlying the claim. In such cases, the plaintiff need only prove that a contract was inferred "from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore and Ohio R.R.* v. *United States*, 261 U.S. 592, 597 (1923); *Cities Service Gas Co.* v. *United States*, 500 F.2d 448, 451-452 (Ct.Cl. 1974).

Under this test, there should be no question about the Indians' right to sue the Government in this case. As indicated previously, the Government, pursuant to its own statutes, regulations, and logging contract terms, has undertaken every detailed aspect of the management and sale of the Indians' timber since even before logging first began on the Quinault Reservation. In return for these promised services, it has charged the Indians an administrative fee so large that it substantially exceeds the cost of the services.[76] The Indians' attack on the legitimacy of those fees (as opposed to the reasonableness) was rejected by the Court of Claims. *Quinault Allottee Ass'n* v. *United States*, 485 F.2d 1391 (Ct.Cl. 1973), *cert. denied*, 416 U.S. 961 (1974). If the fees are legally authorized and the promised services are not performed properly (or at all in some cases), there should clearly be an implied contract with a concomitant right to sue on the part of the Indians. The Justice Department seems to concede this (Br. 16 n.6), at least to the extent of recovery of the excessive fees.

We believe there is an implied contract in another respect. The terms of the Treaty of Olympia provided that the Indians would cede their aboriginal lands to

[76] The Government's own records show that on a cumulative basis as of Fiscal Year 1971, it had taken in some $3.6 million in fees in return for $2.9 million worth of management services on the Quinault Reservation. Plaintiffs' Exhibit DT 17.6-15. We believe that our evidence will show that this disparity has grown since 1971 and that some of the items included as expenditures are improper.

the United States in return for the trust relationship, and a small sum of money later held to be grossly inadequate,[77] and the establishment of a reservation which could be allotted to individuals.[78] The allotments made on the Quinault Reservation pursuant to the General Allotment Act and the Quinault Allotment Act thus were made in fulfillment of the treaty promises.

As the Justice Department pointed out in its brief (Br. 22), the whole intent of this statutory scheme was to educate and train the Indians to become self-sufficient in terms of the white community. As part of this scheme, the trustee was required to manage the Indians' land and timber and has done so since even before all of the allotments were made on the Quinault Reservation. Obviously, the trusteeship and the allotment scheme were part of the consideration in return for the Indians' cession of their aboriginal homelands.[79]

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[77] Under Art. IV of the Treaty of Olympia, 12 Stat. 971, the Quinaults and Quileutes were promised $25,000, whereas the land they ceded was worth $317,000. *See* 10 Ind. Cl. Comm. at 417 (1962).

[78] 12 Stat. 971, Art. VI. The treaty said that the President could assign lots to Indians who were "willing to avail themselves of the privilege, and will locate on the same as a permanent home."

[79] *See* President Nixon's Message to Congress, note 22, *supra*. *See also Cherokee Nation* v. *Georgia*, 30 U.S. 1, 58-59 (1831) (concurring opinions of Thompson and Story, JJ.): ("The treaties made with this [Cherokee] nation purport to secure to it certain rights. These are not gratuitous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the Indians by cession of part of their territory."); *Morrow* v. *United States*, 243 Fed. 854, 857 (8th Cir. 1917), holding that where Indians consented to relinquish their lands and accept trust allotments, there was "a valid contract" between the Government and the Indians; and *United States* v. *Ferry County*, 24 F. Supp. 399, 400 (E.D. Wash. 1938) ("this [allotment] is an express trust for valuable consideration, to the faithful performance of which the United States was legally committed.")

For these reasons there was an implied contract that the Government would manage the Indians' trust timber, and if the Government did not do so adequately, there is an implied right to sue for damages under the Tucker Act, just as for breach of any other implied contract.

D. *The Government's Mismanagement of Trust Assets Is Akin to "Money Improperly Exacted or Retained," and Therefore Directly Creates a Claim Cognizable Under the Tucker Act.*

In *Testan*, this Court indicated that a suit "for money improperly exacted or retained" would be directly cognizable under the Tucker Act, without the necessity of finding an independent waiver of sovereign immunity. 424 U.S. at 401. This is a reference to the first class of cases mentioned in *Eastport*, 372 F.2d at 1007, where the plaintiff "seeks return of all or part of that sum," and plaintiff need only allege violation of the Constitution, a statute, or a regulation. *Id.*

When through lack of prudent care the United States, as trustee with possession and control of an Indian's land, sells it for less than fair value, or allows waste, we believe that this must give rise to a claim tantamount to one for "money improperly exacted or retained." The claim is thereupon cognizable under the Tucker Act without more.

E. *The Justice Department's Argument that the General Allotment Act Cannot be Construed to Subject the Government to a Breach of Trust Suit is Specious.*

The Justice Department devotes much of its argument (Br. 21-29) to the proposition that the General Allotment Act was merely a passive trust under which the Government undertook no management responsibilities, and, thus, that the Act cannot subject the Government

to suit for damages for breach of trust. This argument, however, is irrelevant since the trust relationship itself implicitly grants the necessary consent to suit.[80] Moreover, this argument ignores the reality of the Government's comprehensive and exclusive management activities (*i.e.*, the way the *Interior* Department has construed the Act), and the legislative histories of the other relevant statutes which must be read together (*in pari materia*) with the General Allotment Act as an expression of legislative intent.[81]

As the Justice Department acknowledges (Br. 22), the policy behind the General Allotment Act was to give individual homesteads to Indians to enable them to become self-supporting and to assimilate them into the larger society. The trust and the restriction upon alienation of the land were designed to protect the Indians and assist them in achieving this goal.[82] In *United States* v. *Payne*, 264 U.S. 446 (1924), dealing specifically with the Quinault Reservation, this Court held that timberlands were also to be allotted under the General Allotment Act to achieve the congressional purpose.

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[80] The Justice Department seems to suggest (Br. 24) that the scope of the Government's trust responsibility does not extend to "broad management responsibilities." However, this is certainly contrary to what the Secretary of the Interior has understood and acted upon since he began having the Quinault allotments logged in 1920. In any case, the scope of the Government's management responsibilities is a question on the merits to be established at trial; it does not bear upon whether the Government has consented to be sued for breach of trust.

[81] Br. at 21-29. Justice's "analysis" of the legislative history of the General Allotment Act and related legislation conveniently stops before the passage of the Indian Claims Commission Act.

[82] The Justice Department (Br. 24-25) argues that the only purpose of the trust was to prevent alienation and taxation. As the Court of Claims said, "But that is not what the statute says, nor is it the way in which the Act has been administered." Pet. App. 6a n.11.

When Congress passed the Act of June 25, 1910, 36 Stat. 857, 25 U.S.C. §§ 406 and 407, authorizing the Secretary of the Interior to sell Indian trust timber, it did so partly in recognition of the fact that "in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment." [83] In other words, Congress saw the 1910 Act as necessary to further the purpose of the General Allotment Act of aiding and "civilizing" the Indian.[84] This Court relied heavily upon this same purpose in *Squire* v. *Capoeman*, 351 U.S. 1 (1956) (involving a plaintiff herein), in holding that the Indian's timber sale proceeds were exempt from federal income taxes. This Court reasoned that unless the Indian received the full, untaxed income from his timber, which was all his land was useful for, that income would not "be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence." *Id.* at 9-10.

Immediately after the passage of the 1910 Act, the Interior Department promulgated detailed regulations governing the management and sale of Indian timber.[85]

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[83] H.R. Rep. No. 1135, 61st Cong. 2d Sess., 3 (1910). The Justice Department says that the 1910 Act failed to distinguish between management of Indian lands under a trust patent and those held under a patent with a mere restriction on alienation, and that this is why the Court of Claims did not rely upon the Act in its opinion. This is false. The Government manages the trust and restricted lands as if they were the same. *See* 25 C.F.R. § 141.1(b) (1979). The court relied upon the trust established in the General Allotment Act because that is sufficient for jurisdiction under *Testan* and *Eastport*.

[84] In the Act of March 4, 1911, 36 Stat. 1345 ("Quinault Allotment Act"), Congress further specified the Indians it intended to receive trust allotments on the Quinault Reservation. This again manifests the continuing nature of Congress' intent in effectuating its Indian policy under the General Allotment Act.

[85] Plaintiffs' Exhibit DT 3.3-1.1.

In 1920 (coinciding with the beginning of logging on the Quinault Reservation), Congress decided that the Government should be compensated for its services in managing and selling the Indians' timber and passed a statute authorizing the involuntary deduction by the Government from the Indians' timber sale proceeds of a reasonable fee to cover the cost of these services.[86] The Interior Department then promulgated new regulations governing every detailed aspect of the management and sale of Indian timber and specifying what the fee was to cover.[87] This again demonstrates not only the pervasiveness of the Government's management activities with respect to the Indians' timber, but also Congress' recognition of this fact and its decision that the Government should be paid for its services.

In 1934, Congress passed the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, which essentially recognized the failure of the allotment policy and provided for the restoration and protection of Indian trust land. Though abandoning the allotment policy, Congress nevertheless reaffirmed and strengthened the Government's management role with respect to Indian trust property. In Section 6 of the Act (now 25 U.S.C. § 466), Congress required that Indian forests be managed on a sustained yield basis. This was referred to as a directive.[88]

Under the long-established policies that statutes passed for the benefit of Indians are to be "liberally construed, doubtful expressions being resolved in favor of the In-

[86] Act of February 14, 1920, 41 Stat. 415, 25 U.S.C. § 413.

[87] Plaintiffs' Exhibit DT 3.3-15. The fee in the large Quinault timber sale contracts has been changed from time to time, but has ranged from 6 to 10 percent.

[88] See quotation by Commissioner of Indian Affairs John Collier at page 33, *supra*.

dians," [89] and that such statutes are to be construed *in pari materia*,[90] it should be clear that the subsequent acts of Congress dealing with the Government's trust responsibilities are all part of a continuous purpose on the part of Congress. The *in pari materia* rule is particularly appropriate here since it is typically used in the case of multiple statutes dealing with the same legislative purpose in order to determine the legislative intent behind the earlier statute(s). *See NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Dir. Office of Workers Compensation Programs* v. *Nat'l Mines Corp.*, 554 F.2d 1267, 1275 (4th Cir. 1977). In fact, this Court has already construed the General Allotment Act *in pari materia* with other statutes, saying that they—

> ". . . constitute part of a single system evidencing a continuous purpose on the part of Congress . . . directed toward the benefit and protection of the Indians . . . ." [91]

Similarly, the Ninth Circuit, quoting *Jackson*, construed the General Allotment Act *in pari materia* with subsequent Indian statutes, including the Indian Reorganization Act. *Stevens* v. *Comm'r*, *supra*, 452 F.2d at 746.

[89] *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976) (citations omitted). This Court has relied upon this canon on scores of occasions beginning with *Worcester* v. *Georgia*, 31 U.S. 515, 582 (1832), and it is particularly appropriate with respect to the statutes in question here since all of them were passed ostensibly to benefit the Indians.

[90] *See, e.g., Menominee Tribe* v. *United States*, 391 U.S. 404, 411 (1968); *Stevens* v. *Comm'r*, 452 F.2d 741, 746 (9th Cir. 1971); *Kirkwood* v. *Arenas*, 243 F.2d 863, 866-867 (9th Cir. 1957).

[91] *United States* v. *Jackson*, 280 U.S. 183, 196 (1930). One of the statutes referred to by the Court, even though it was not directly involved, was the Act of June 25, 1910, which, *inter alia*, authorized the sale of Indian timber. The Court noted with approval the Interior Department's construction of that Act together with the General Allotment Act in connection with its determination of heirs under the latter Act.

Thus, it should be beyond dispute today that the General Allotment Act and subsequent statutes, up to and including the Indian Claims Commission Act, evidencing the "continuing purpose on the part of Congress" to aid and protect the Indians, must be construed together as a declaration of legislative intent. Since that intent included provisions for the sale and sustained yield management of Indian timber, Indians should be entitled to sue under the Tucker Act when the Government has mismanaged these functions.

IV. This Court, the Court of Claims, and Two Federal District Courts Have Expressly or Tacitly Upheld Jurisdiction Over Breach of Trust Damage Claims Under 28 U.S.C. §§ 1491 and 1505.

A. *Suits by Individual Indians Under the Tucker Act.*

Individual Indians have the right to sue the United States for money damages under the Tucker Act, 28 U.S.C. § 1491, the same as non-Indian plaintiffs. The first such case of which we are aware that was characterized as a breach of trust claim is *Klamath and Modoc Tribes* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966). In that case, a number of individual Indians (and the Klamath Tribe) sued under 28 U.S.C. §§ 1491 and 1505 for a general accounting of trust funds. The Court of Claims held that it did not have jurisdiction to order a general accounting, but stressed that it did have jurisdiction over the claims for damages based upon the mismanagement of Indian trust funds and property by the United States:

> "We emphasize that our action today [refusing to order the United States to prepare an accounting] does not leave the Klamath Tribe and the individual Indians without a forum for the recovery of any damages to which they are entitled because of the Government's mishandling of tribal funds and property. No special jurisdictional act is required to provide that relief." [92]

In *Mason* v. *United States*, 461 F.2d 1364 (Ct.Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973), the Court of Claims upheld jurisdiction under the Tucker Act over a claim by an individual Indian heir alleging that the United States had breached its trust obligations by using trust funds to pay a state tax on the estate of a deceased Osage Indian. The Indian sought damages for the wrongful disbursements from the trust. The Court of Claims stated:

> "A suit against the United States on behalf of the estate of a non-competent Indian, for damages compensating the estate for breach by the Government of its trust obligation under a federal statute, is within 28 U.S.C. § 1491 as a claim founded upon an Act of Congress and for damages 'in cases not sounding in tort.' " [93]

Contrary to the Government's assertion (Br. 26 n.15), the jurisdictional issue *was* contested and briefed by both sides in the Court of Claims. Apparently, the Government decided to abandon the jurisdictional issue in this Court, and it was not argued again. This Court did, however, note that the Government owed "great care in administering its trust," and that jurisdiction was based upon 28 U.S.C. § 1491.[94]

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[92] 364 F.2d at ——. *Cf.* four other Indian cases upholding jurisdiction under 28 U.S.C. § 1491. Though these were not expressly characterized as breach of trust claims, the existence of the fiduciary relationship was important. *Fields* v. *United States*, 423 F.2d 380 (Ct. Cl. 1970); *Hebah* v. *United States*, 428 F.2d 1334 (Ct. Cl. 1970); *Capoeman* v. *United States*, 440 F.2d 1002 (Ct. Cl. 1971); *Quinault Allottee Ass'n* v. *United States*, 485 F.2d 1391 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974). The latter two were decisions involving some of the instant plaintiffs.

[93] 461 F.2d at 1374.

[94] 412 U.S. at 391, and 394 n.5.

B. *Suits by Tribes and Groups of Indians Under 28 U.S.C. § 1505.*

In four Court of Claims cases and two district court cases, jurisdiction was expressly or tacitly upheld under 28 U.S.C. § 1505 for Indian tribal and group claims against the Government for breach of trust.

In *Klamath and Modoc Tribes* v. *United States, supra*, the Court of Claims held that it had jurisdiction over the tribal claims for damages based upon the mismanagement of Indian trust property by the United States.[95]

In *Navajo Tribe* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966), the Navajo Tribe alleged that it had received inadequate compensation under three oil and gas leases on its lands. Two of the claims were made under a special jurisdictional act and the third under 28 U.S.C. § 1505. No question of the Court of Claims' jurisdiction was apparently ever raised, and the court evaluated all three claims on the merits, awarding damages on two and denying relief on the third.

In *Cheyenne-Arapaho Tribes* v. *United States*, 512 F.2d 1390 (Ct.Cl. 1975), a number of Indian tribes brought suit under 28 U.S.C. § 1505 claiming damages for the Government's mismanagement in handling tribal funds. The Court of Claims upheld jurisdiction over the claims, citing Section 1505 and stating:

> "[B]ecause the United States in effect imposes trust status on the Indian funds, our jurisdiction to review discretionary acts of the Secretaries of the Interior and Treasury in administering the trust is broad enough to cover the types of claims made here.[96]

Finally, in *Coast Indian Community* v. *United States*, 550 F.2d 639 (Ct.Cl. 1977), a case decided after *Testan*,

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[95] 364 F.2d at ——.

[96] 512 F.2d at 1392.

the Court of Claims upheld the claim of an unincorporated association of Indians, presumably brought under 28 U.S.C. § 1505, that the Government as trustee had sold a logging right-of-way over their land for inadequate consideration. In finding a breach of fiduciary duty and awarding damages, the court implicitly held that it had jurisdiction over the claim.

Similarly, two district court cases have awarded damages in Indian breach of trust claims under the Tucker Act. *Manchester Band of Pomo Indians* v. *United States*, 363 F. Supp. 1238 (N.D. Cal. 1973), and *Smith* v. *United States*, Nos. C-74-1016 and C-74-1061 (N.D. Cal. 1979).

In view of the foregoing cases, it had been generally thought that the jurisdiction of the Court of Claims over breach of trust claims was well settled.

CONCLUSION

For the foregoing reasons, the decision of the Court of Claims should be affirmed.

Respectfully submitted,

Charles A. Hobbs
1735 New York Avenue, N.W.
Washington, D.C. 20006

Counsel for Respondents

Wilkinson, Cragun & Barker
Jerry R. Goldstein
Robin A. Friedman

Of Counsel

September 24, 1979

APPENDIX

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

[INTERIOR
SEAL]

Nov. 21, 1978

Honorable James W. Moorman
Assistant Attorney General
United States Department of Justice
Washington, D.C. 20530

Re: *United States* v. *Maine*

Dear Mr. Moorman:

By letter of October 20, 1978, to the Attorney General, I requested that Justice not file any pleading designed to advise the federal district court of the government's view of the nature of the trust relationship between the United States and Indian tribes. I hereby reaffirm the views set forth in my October 20 letter. I did suggest in the letter, however, that Justice and Interior continue to work on the legal questions concerning the government's trust responsibility.

Congress has reposed principal authority for "the management of all Indian affairs and of all matters arising out of Indian relations" with this Department. 25 U.S.C. Sec. 2. As you no doubt realize, any legal memorandum filed by the Attorney General on such a broad issue as the trust responsibility would have far reaching policy implications. We have serious reservations about the statement as originally drafted and I am attaching a line by line critique, as promised, as a way to highlight some of the disputed issues. To be of further assistance to you, set forth below is this Department's view of the

legal obligations of the United States, as defined by the courts, with respect to Indian property interests.

That the United States stands in a fiduciary relationship to American Indian tribes, is established beyond question. The specific scope and content of the trust responsibility is less clear. Although the law in this area is evolving, meaningful standards have been established by the decided cases and these standards affect the government's administration of Indian policy. Our discussion is confined to the government's responsibilities concerning Indian *property* interests and should be understood in that context. Our conclusions may be summarized as follows:

1. There is a legally enforceable trust obligation owed by the United States Government to American Indian tribes. This obligation originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements, and statutes pertaining to Indians.

2. While Congress has broad authority over Indian affairs, its actions on behalf of Indians are subject to Constitutional limitations (such as the Fifth Amendment), and must be "tied rationally" to the government's trust obligation; however, in its exercise of other powers, Congress may act contrary to the Indians' best interests.

3. The trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.

4. Executive branch officials have discretion to determine the best means to carry out their responsibilities to the Indians, but only Congress has the power to set policy objectives contrary to the best interests of the Indians.

5. These standards operate to limit the discretion not only of the Secretary of the Interior but also of the Attorney General and other executive branch officials.

ORIGIN OF THE DOCTRINE

The origin of the trust relationship lies in the course of dealings between the discovering European nations and (later the original states and the United States) the Native Americans who occupied the continent. The interactions between these peoples resulted in the conclusion by this country of treaties and agreements recognizing the quasi-sovereign status of the Native American tribes.

The Supreme Court has stated that:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 715 (1943).

Inplicitly, the Court recognized the course of history by which the Indian tribes concluded treaties of alliance or —after military conquest—peace and reconciliation with the United States. In virtually all these treaties, the United States promised to extend its protection to the tribes. Consequently, the trust responsibility to Native Americans has its roots for the most part in solemn contracts and agreements with the tribes. The tribes

ceded vast acreages of land and concluded conflicts on the basis of the agreement of the United States to protect them from persons who might try to take advantage of their weak position. No comparable duty is owed to other United States citizens.

While the later executive agreements and presidential orders implementing them with tribes are shorter and less explicit than the treaties, a similar guarantee of protection can be implied from them. As the Court stated recently in *Morton* v. *Mancari*, 417 U.S. 535 (1974), then, "the unique legal status of Indian tribes under federal law (is) . . . based on a history of treaties and the assumption of a guardian-ward status."

The treaties and agreements represented a kind of land transaction, contract, or bargain. The ensuing special trust relationship was a significant part of the consideration of that bargain offered by the United States. By the treaties and agreements, the Indians commonly reserved part of their aboriginal land base and this reservation was guaranteed to them by the United States. By administrative practice and later by statute, the title to this land was held in trust by the United States for the benefit of the Indians.

From the beginning, the Congress was a full partner in the establishment of the federal trust responsibility to Indians. Article III of the Northwest Ordinance of 1787, which was ratified by the first Congress assembled under the new Constitution in 1789, 1 Stat. 50, 52, declared:

> The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be

> made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

And in 1790, Congress enacted the Non-Intercourse Act, 1 Stat. 137, 138, now codified as 25 U.S.C. § 177, which itself established a fiduciary obligation on the part of the United States to protect Indian property rights. *See Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975), and *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676, 677-699 (9th Cir. 1976).

Articulation of the concept of the federal trust responsibility as including more protection than simple federal control over Indian lands evolved judicially. It first appeared in Chief Justice Marshall's decision in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831). *Cherokee Nation* was an original action filed by the tribe in the Supreme Court seeking to enjoin enforcement of state laws on lands guaranteed to the tribe by treaties. The Court decided that it lacked original jurisdiction because the tribe, though a "distinct political community" and thus a "state," was neither a State of the United States nor a foreign state and was thus not entitled to bring the suit initially in the Court. Chief Justice Marshall concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations. . . in a state of pupilage" and that "their relation to the United States resembles that of a ward to his guardian." Chief Justice Marshall's subsequent decision in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), reaffirmed the status of Indian tribes as self-governing entities without, however, elaborating on the nature or meaning of the guardian-ward relationship.

Later in the nineteenth century, the Court used the guardianship concept as a basis for congressional power, separate and distinct from the commerce clause. *United States* v. *Kagama*, 118 U.S. 375 (1886), concerned the

constitutionality of the Major Crimes Act. Although it concluded that this statute was outside the commerce power, the Court sustained the validity of the act by reference to the Government's fiduciary responsibility. The Court stated that "[t]hese Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power."

A number of cases in the decades on either side of 1900 make express reference to such a power based on the federal guardianship, e.g., *LaMotte* v. *United States*, 254 U.S. 570, 575 (1921) (power of Congress to modify statutory restrictions on Indian land is "an incident of guardianship"); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property"), and the Supreme Court has continued to sustain the constitutionality of Indian statutes as derived from an implicit power to implement the "unique obligation" and "special relationship" of the United States with tribal Indians. Cf. *Morton* v. *Mancari*, 417 U.S. 345, 552, 555 (1973).

LIMITATIONS ON CONGRESS

Congressional power over Indian affairs is subject to constitutional limitations. While Congress has the power to abrogate Indian treaties, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), Indian property rights are protected from repeal by the Fifth Amendment, *Choate* v. *Trapp*, 224 U.S. 665, 678 (1912). The Supreme Court held in *Chippewa Indians* v. *United States*, 301 U.S. 358 (1937), that

> * * * Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own. * * * (P. 375-376).

In addition to these constitutional limitations on Congress' power to implement its trust responsibility, the Court has observed that the guardianship "power to control and manage" is also "subject to limitations inhering in a guardianship," *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935), although the cases do not clarify with precision what limitations "inhere in a guardianship" so far as Congress is concerned. Recent cases have, however, considered the United States' trust obligations as an independent limiting standard, for judging the constitutional validity of an Indian statute, rather than solely a source of power. In *Morton* v. *Mancari*, 417 U.S. 535 (1974), the Supreme Court upheld the constitutionality of a statute granting Indians an employment preference in the Bureau of Indian Affairs, stating:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indian, such legislative judgments will not be disturbed. Id. at 555.

Delaware Tribal Business Council v. *Weeks*, 430 U.S. 73 (1977), expressly held that the plenary power of Congress and the separation of powers shield "does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny." The Court in *Weeks* took the significant step of examining on the merits claims by one group of Indians that legislation had denied them due process, and it applied the above-quoted standard from *Mancari*.

This standard, in practice, does not suggest that a reviewing court will second guess a particular determina-

tion by Congress that a statute in fact is an appropriate protection of the Indians' interests. Congressional discretion seems necessarily broad in that respect. But the power of Congress to implement the trust obligation would not seem to authorize enactments which are manifestly contrary to the Indians best interests. This does not mean that Congress could never pass a statute contrary to its determination that the Indians' best interests are served by it. Congress in its exercise of other powers such as eminent domain, war, or commerce, may act in a manner inimical to Indians. However, where Congress is exercising its authority over Indians, rather than some other distinctive power, the trust obligation would appear to require that its statutes must be based on a determination that the protection of the Indians will be served. Otherwise, a statute would not be rationally related to the trusteeship obligation to Indians. Cf., *Fort Berthold Reservation* v. *United States*, 390 F.2d 686, 691-693 (Ct. Cl. 1968).

The trust obligations of the United States constrain congressional power in another way. Since it is exercising a trust responsibility in its enactment of Indian statutes, courts presume that Congress' intent toward the Indians is benevolent. Accordingly, courts construe statutes (as well as treaties) affecting Indians as not abrogating prior Indian rights or, in case of ambiguity, in a manner favorable to the Indians. E.g., *United States* v. *Santa Fe Pacific Ry.*, 314 U.S. 339 (1941). This presumption is rebuttable in that the courts have also held that Congress can unilaterally alter treaty rights or act in a fashion adverse to the Indians interests—even to the point of terminating the trust obligation. But such an intent must be "clear," "plain" or "manifest" in the language or legislative history of an enactment. *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).

LIMITATION ON ADMINISTRATIVE DISCRETION

In Indian, as in other matters, federal executive officials are limited by the authority conferred on them by statute. In addition, the federal trust responsibility imposes fiduciary standards on the conduct of the executive —unless, of course, Congress has expressly authorized a deviation from those standards. Since the trust obligation is binding on the United States, fiduciary standards of conduct would seem to pertain to all executive departments that may deal with Indians, not just those such as the Departments of Interior and Justice which have special statutory responsibilities for Indian affairs. This principle is implicit in *United States* v. *Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976), where the court employed the canon of construction that ambiguous federal statutes should be read to favor Indians to thwart the efforts of the Army Corps of Engineers to take tribal land.

A number of court decisions hold that the federal trust responsibility constitutes a limitation upon executive authority and discretion to administer Indian property and affairs. A leading case is *United States* v. *Creek Nation*, 295 U.S. 103 (1935), where the Supreme Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages against the United States for lands which had been excluded from their reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. The Court bottomed its decision on the federal trust doctrine:

> The tribe was a dependent Indian community under the guardianship of the United States and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting

> and advancing the tribe, it was subject to *limitations inhering in such a guardianship* and to pertinent constitutional restrictions. 295 U.S. at 109-110. (emphasis added)

Creek Nation stands for the proposition that—unless Congress has expressly directed otherwise—the federal executive is held to a strict standard of compliance with fiduciary duties. For example, the executive must exercise due care in its administration of Indian property; it cannot as a result of a negligent survey "give the tribal lands to others, or . . . appropriate them to its own purposes." Other decisions of the Supreme Court reviewing the lawfulness of administrative conduct managing Indian property have held officials of the United States to "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and to be bound "by every moral and equitable consideration to discharge its trust with good faith and fairness." *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297, (1942); *United States* v. *Payne*, 264 U.S. 446, 448 (1924). Decisions of the Court of Claims have also held that the ordinary standards of a private fiduciary must be adhered to by executive officials administering Indian property. E.g., *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977); *Cheyenne-Arapahoe Tribes* v. *United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975); *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10, 18-19 (1944); *Navajo Tribe* v. *United States*, 364 F.2d 320, 322-324 (Ct. Cl. 1966).

Creek Nation and the other cited cases were for money damages under special jurisdictional statutes in the Court of Claims. Other decisions have granted declaratory and injunctive relief against executive actions in violation of ordinary fiduciary standards. An important example is *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919), where the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. That action, the Court observed, "would not be an exercise of the guardianship, but an act of confiscation." 249 U.S. at 113.

Federal officials as trustees are not insurers. The case of *United States* v. *Mason*, 411 U.S. 391 (1973), sustains as reasonable a decision by the Interior Department not to question certain state taxes on trust property. But the case law in recent years generally holds executive action to be reviewable both under the terms of specific statutes and for breach of obligations of an ordinary trustee. A significant recent federal district court decision, *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972), enjoins certain diversions of water for a federal reclamation project which adversely affected a downstream lake on an Indian reservation. Although the diversions violated no specific statute or treaty, the court held them in violation of the trust responsibility.

The court held that the Secretary of the Interior—as trustee for the Indians—was obliged to discharge his potentially conflicting duty to administer reclamation statutes in a manner which does not interfere with Indian rights. The court restrained the diversions because the Secretary's activities failed "to demonstrate an adequate recognition of his fiduciary duty to the Tribe." The Department of Justice acquiesced in this decision and chose not to appeal.

If, as we believe, the decisions in such cases as *Creek Nation*, *Pueblo of Santa Rosa*, and *Pyramid Lake* are sound, it follows that executive branch officials are obliged to adhere to fiduciary principles. These cases, in other words, lead to the conclusion that the government is in fact a trustee for the Indians and executive branch officials must act in accordance with trust principles unless Congress specifically directs otherwise.

INDEPENDENT EXISTENCE

In addition, the decided cases strongly suggest that the trust obligation of the United States exists apart from specific statutes, treaties or agreements. As previously stated, the Supreme Court in *United States* v. *Kagama*, 118 U.S. 375 (1886), sustained the validity of the Major Crimes Act on the basis of the trust relationship, separate and apart from other constitutional powers. And *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919), *United States* v. *Creek Nation*, 295 U.S. 103 (1935), and *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972), apply the trust responsibility to restrain executive action without regard to any specific treaty, statute or agreement.

This view is reinforced by reference to the origins of the trust responsibility doctrine. Originally, Great Britain claimed for itself sovereignty over all Indian lands in the English colonies. In 1763, the King issued a Royal Proclamation, the precursor of the federal Non-Intercourse Act, decreeing that Indian lands were owned by the Crown and that no person or government could acquire such lands without the consent of the Crown. This policy reflected the practical need of the Crown to assert its control over the land and wealth of the colonies and to preserve peace among the colonists and the Indians. Notably, the 1763 Proclamation applied to all Indians without regard to the presence or absence of specific treaties or agreements.

When the United States acquired sovereignty from Great Britain, it succeeded to all the incidents of the prior sovereign's power. The United States not only did not renounce the peculiar power and duty assumed by Great Britain over Indians, but endorsed it by specific reference in Article I of the Constitution.

The recent decision in *Delaware Tribal Business Council* v. *Weeks*, 430 U.S. 73 (1977), holds that the trust responsibility is subject to due process limitations. *Weeks* holds that Congress is not free to legislate with respect to Indians in any manner it chooses; rather, Congressional action with respect to Indians is subject to judicial review and will be sustained only so long as it can be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

Other recent Supreme Court opinions shed further light on what is meant by the "unique obligation toward the Indian." In *Morton* v. *Ruiz*, 415 U.S. 199 (1974), the Court in holding that the Bureau of Indian Affairs erred in excluding a certain category of Indians from the benefits of its welfare program spoke of the "overriding duty of our Federal Government to deal fairly with Indians." 415 U.S. at 236. This statement appears as part of the procedural rights of Indians, and in this connection the Court cited *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942), which says governmental action must be judged by the "strictest fiduciary standards." Most recently, in *Santa Clara Pueblo* v. *Martinez*, —— U.S. —— (1978), the court reviewed the record of limited Indian participation in the hearings on the Indian Civil Rights Act and said:

> It would hardly be consistent with "the overriding duty of our Federal Government to deal fairly with Indians," *Morton* v. *Ruiz*, 415 U.S. 199, 236 (1974), lightly to imply a cause of action on which the tribes had no prior opportunity to present their views. —— U.S. ——, —— n.30 (1978).

The "unique obligation" mentioned in *Weeks* and the "overriding duty" of fairness discussed in *Ruiz* and *Martinez* exist apart from any specific statute, treaty or agreement, and they impose substantive constraints on the Congress (*Weeks*), the Executive (*Ruiz*) and the Ju-

diciary (*Martinez*) with respect to Indians. These recent decisions of the Supreme Court lead to the conclusion that the government's trust responsibility to the Indian has an independent legal basis and is not limited to the specific language of the statutes, treaties and agreements.

At the same time, however, the content of the trust obligation—apart from specific statutes and treaties—is limited to dealing fairly, not arbitrarily, with the Indians both with respect to procedural and substantive issues. The standard of fairness is necessarily vague and allows considerable room for discretion. But these independently based duties do not stand alone. They must be read together with the host of statutory and treaty provisions designed to provide protection for Indian interests. Illustrative of such statutes are 25 U.S.C. Sec. 81 (contracts); 25 U.S.C. Sec. 175 (legal representation); 25 U.S.C. Sec. 177 (conveyance of property); 25 U.S.C. Sec. 194 (burden of proof in property cases); 25 U.S.C. Secs. 261-264 (regulation of traders); 25 U.S.C. Sec. 465 (acquisition of land in trust).

The more general notions of the "unique obligations" and "overriding duty" of fairness form a backdrop for the construction and interpretation of the statutes, treaties, and agreements respecting the Indians. This means that provisions for the benefit of Indians must be read to give full effect to their protective purposes and also they must be given a broad construction consistent with the trust relationship between the government and the Indians. General notions of fiduciary duties drawn from private trust law form appropriate guidelines for the conduct of executive branch officials in their discharge of responsibilities toward Indians and are properly utilized to fill any gaps in the statutory framework.

SPECIFIC OBLIGATIONS

The decided cases set forth a number of specific obligations of the trusteeship. *Navajo Tribe* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966). During the second World War, an oil company had leased tribal land for oil and gas purposes. Upon discovering helium, bearing noncombustible gas which it had no desire to produce, the company assigned the lease to the Federal Bureau of Mines. The Bureau developed and produced the helium under the terms of the assigned lease instead of negotiating a new, more remunerative lease with the tribe. In *Navajo*, the court analogized these facts to the case of a "fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself," and held the action unlawful. *Pyramid Lake* discussed above also involves the fiduciary duty of loyalty.

Manchester Band of Pomo Indians v. *United States*, 363 F. Supp. 1238 (N.D. Cal., 1973), holds that the government as trustee has a duty to make trust property income productive. The federal district court held, in that case, that officials of this Department had violated their trust obligations by failing to invest tribal funds in nontreasury accounts bearing higher interest than was paid by treasury accounts. *Menominee Tribe* v. *United States*, 101 Ct. Cls. 10 (1944), also enforces the fiduciary obligation to make trust property income productive.

Pyramid Lake Paiute Tribe v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972), imposes on the United States the duty to enforce reasonable claims of the beneficiary. This duty may be seen as related to the duty of loyalty. In *Pyramid Lake*, the court rejected an accommodation of public interests and trust obligations and held that the Secretary of Interior had a higher obligation to protect Indian property rights than to advance public projects within his charge—again, absent an express direction from Con-

gress. Where there is a dispute between Indians and other government interests, executive branch officials are required to favor the Indian claim so long as it is reasonable.

The Supreme Court has held that executive branch officials are not required to advance or accede to every colorable claim which may be suggested by an Indian tribe. *United States* v. *Mason*, 412 U.S. 391 (1973). It appears that the government may properly examine these claims critically and make a dispassionate analysis of their merit, it may consider whether the advancement of a particular claim is in the long term best interests of the Indians, and it may determine the timing and the forum in which a claim is advanced. But executive branch officials may not reject or postpone the assertion of a claim on behalf of Indians on the ground that it would be inimical to some other governmental or private interest or refuse to advance an Indian claim on the ground that it is merely "reasonable" as opposed to clearly "meritorious." Although trust duties are neither rigid nor absolute, the controlling principle is that executive branch officials must act in the best interests of the Indians.

The Supreme Court has held that the United States as trustee has some discretion to exercise reasonable judgment in choosing between alternative courses of action. *United States* v. *Mason*, 412 U.S. 391 (1973). In *Mason*, Indian allottees claimed that Bureau of Indian Affairs officials erred in paying state estate tax assessments on trust properties. Bureau officials relied on a prior decision of the Supreme Court which had sustained the particular taxes in question. With some plausibility, however, the allottees claimed that subsequent Supreme Court decisions had eroded the vitality of the earlier case. The Court determined that in this instance the trustee had acted reasonably by paying the taxes without protest. In *Mason*, unlike *Pyramid Lake*, there was no suggestion that any conflicting interests had detracted from the trustee's duty of loyalty to the Indians, and the case stands for the proposition that in the nonconflict situation, the trustee's reasonable judgments will be sustained.

Another principle which follows from this reading of the Indian trust cases is that affirmative action is required by the trustee to preserve trust property, particularly where inaction results in default of trust rights. Cf., *Poafybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 369 (1968); *Edwardsen* v. *Morton*, 369 F. Supp. 1359 (D.D.C. 1973). The water rights area is a prime example. The Indians' rights to water pursuant to cases like *Winters* v. *United States*, 207 U.S. 564 (1908), and *Arizona* v. *California*, 373 U.S. 546 (1963), is prior to any subsequent appropriations. But failure of the trustee in the past to assert or protect these rights, and to assist in construction of Indian irrigation projects, has led non-Indian ranchers and farmers to invest large sums in land development in reliance on the seeming validity of their appropriations. See *Report of the National Water Commission*, ch. 14 (1973). The trust obligation would appear to require the trustee both to take vigorous affirmative action to assert or defend these Winters Doctrine claims. See, *Pyramid Lake Paiute Tribe* v. *Morton*, *supra*.

The impact of these principles upon the public administration within the government appears to be surprisingly modest, for present policies are essentially consistent with the dictates of the trust responsibility. In the area of water rights, for example, President Carter has called for the prompt quantification of Indian claims and their determination through negotiation if possible or litigation if necessary, and he has also called for development of Indian water resources projects so that the Indian rights may be put to beneficial use. The President's perception of the government's responsibility in this area appears entirely consistent with the dictates of the trust responsi-

bility doctrine. The obligation of executive branch officials is to implement the President's policy. Similarly, the Departments of Interior and Justice are engaged in the process of enforcing reasonable Indian claims in some instances by negotiation and in others through litigation. The Bureau of Indian Affairs works to make trust property income productive and the present Secretary of the Interior, so far as we are aware, has taken no action inconsistent with his duty of loyalty to the Indians.

Even if the imposition of the trust responsibility doctrine is assumed to be completely consistent with present policy and administrative practice, the doctrine clearly places constraints on the future policy formulation and administrative discretion. Executive branch officials have some discretion in the discharge of the trust, but it is limited. For example, they may make a good faith determination that the compromise of an Indian claim is in the long term best interests of the Indians, but they are not free to abandon Indian interests or to subordinate those interests to competing policy considerations. Flexibility in setting policy objectives rests with Congress which alone is free to direct a taking or subordination of the otherwise paramount Indian interests.

Instances will surely arise where the discharge of trust responsibilities to the Indians raises unmanageable, practical or political difficulties for executive branch officials. It may be that congressional appropriations are inadequate to carry out a perceived duty—say, the quantification of Indian water entitlements—or that the enforcement of trust responsibilities results in an extraordinary intense political backlash against the administration. Under such circumstances, it would seem that the responsibility of executive branch officials would be to seek express direction from the Congress. The existence of this congressional safety valve assures that the legal trust responsibility to American Indians is a viable doctrine not only now but in the future as well.

THE DEPARTMENT OF JUSTICE

The remainder of this memorandum will address some of the more specific questions which have been raised by the Attorney General in connection with litigation by the Department of Justice on behalf of Indians. How does Indian litigation differ, if at all, from other litigation handled by the Department of Justice? Do special standards constrain the prosecutorial discretion of the Attorney General?

By statute, the conduct of litigation in which the United States is a party is reserved to the officers of the Department of Justice under the direction of the Attorney General. 28 U.S.C. 516, 519. In addition, the United States Attorneys, under the direction of the Attorney General, are specifically authorized to represent Indians in all suits at law and in equity. 25 U.S.C. 175.

Generally, the Attorney General has broad discretion to determine whether and when to initiate litigation and on what theories. As the chief legal officer of the United States, the Attorney General may consider broad policy consequences of a litigation strategy and may refuse to initiate litigation despite the requests of a particular agency.

The discretion of the Attorney General with respect to the initiation of litigation is not unlimited. First, the exercise of prosecutorial discretion by the Attorney General is subject to judicial review in order to insure that the Attorney General's decision is based on a correct understanding of the law. *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 388 F. Supp. 649, 665-666 (D. Me. 1975), aff'd, 528 F.2d 370 (1st Cir. 1975). Cf. e.g., *Nader* v. *Saxbe*, 497 F.2d 676, 679-680 n. 19 (D.C. Cir. 1974). And second, all executive branch officials including the Attorney General can be required by the judiciary to "faithfully execute the laws" which, in some

instances, may require the initiation of litigation. E.g., *Adams* v. *Richardson*, 351 F. Supp. 636, 641 (D.D.C. 1972), 356 F. Supp. 921 (D.D.C. 1973), mod. and aff'd., 480 F.2d 1159 (D.C. Cir. 1973).

In the case of Indian litigation, the Attorney General's discretion is somewhat more limited than in other areas. As under the principles discussed above, an officer of the executive branch of government the Attorney General acts as a fiduciary and must accord the Indians a duty of loyalty. This means that in the exercise of discretion the Attorney General may not refuse to initiate litigation on the ground that it would be inimical to the welfare of some other governmental or private interest. And the Supreme Court has suggested that the Attorney General has an affirmative obligation to institute litigation on behalf of Indians. *Poafybitty* v. *Skelly Oil*, 390 U.S. 365, 369 (1968).

The Attorney General has no obligation to assert every claim or theory advanced by an Indian tribe without regard to its merit. At the same time, the Attorney General may not abandon reasonable Indian claims on any ground other than the best interests of the Indians. Further, in the exercise of discretion, the Attorney General must take care that litigation decisions do not undercut the efforts of the Secretary of Interior or other executive branch officials to discharge their trust responsibilities to the Indians. As the Supreme Court recently stated: "Where the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not repudiate it." *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13 (1972). Indeed, published opinions of the Attorney General reflect the great deference which has been accorded by the Department of Justice to the decisions of the Secretary of Interior. 25 Op. Atty. Gen. 524, 529 (1905); 20 Op.

Atty. Gen. 711, 713 (1894); 17 Op. Atty. Gen. 332, 333 (1882).

The fulfillment of this nation's trust responsibility to American Indians is one of the major missions of this Department. Both the President and the Vice-President have publicly stated their support of the trust responsibility as a matter of policy.

The definition of the government's trust responsibilities to Native Americans involves both legal and policy issues. The President's P.R.I.M. process is designed to assure development of policy after input from all concerned. It would be unfortunate to preempt this process by filing a memorandum in a court case that was not asked for by the judge and is not necessary to the litigation which will be moot if Congress and the tribes approve. If the Attorney General wants to address the legal issues regarding the trust responsibility, it would be more appropriate to do so through a formal Attorney General's opinion.

Sincerely

LEO M. KRULITZ

Solicitor

[Ed. note: This letter received wide distribution among Indian tribal representatives.]

FOR ARGUMENT

No. 78-1756

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN MITCHELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1756

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN MITCHELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

1. Without abandoning reliance on the Tucker Act, respondents now primarily assert (Resp. Br. 14-28) that Section 24 of the Indian Claims Commission Act, 28 U.S.C. 1505, establishes a right to recover in money damages against the United States for any "breach of trust" when the claim is brought by a "tribe, band, or other identifiable group of American Indians." We have already dealt with the suggestion that Section 1505 encompasses a wider category of claims than the Tucker Act (Br. 12-15 n.5, 32 n.24).[1] We add here only that, even if respondents were correct in their contention, their reasoning is unavailing for the 1,465 individual litigants in this case who must prevail, if at all, under 28 U.S.C. 1491 rather than 28 U.S.C. 1505.

[1]The Court of Claims has rejected the claim that 28 U.S.C. 1505 does anything more than give "to Indian tribes the same right to sue in this court as is granted to others under the Tucker Act." *Klamath*

Despite respondents' contentions to the contrary (Resp. Br. 26-27 n.49), the claims of the individuals allottees are not within 28 U.S.C. 1505. That provision applies only to claims brought by a "tribe, band, or other identifiable group of American Indians." *Fields* v. *United States*, 423 F. 2d 380, 383 (Ct. Cl. 1970); *Cherokee Freedmen* v. *United States*, 161 Ct. Cl. 787 (1963). The very purpose of the allotment process was to treat Indians as individuals in the settling and use of reservation lands (Br. 22-23), and the claims of individual allottees with respect to their allotments must be brought under 28 U.S.C. 1491.[2]

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and Modoc Tribes v. *United States*, 174 Ct. Cl. 483, 489-490 (1966). See also *Menominee Tribe of Indians* v. *United States*, No. 134-67 (Ct. Cl. Oct. 17, 1979), slip op. 9-10. The statute was designed to lift the previous bar to tribal suits in the Court of Claims so that "Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims." 92 Cong. Rec. 5313 (1946). See also H.R. Rep. No. 1466, 79th Cong., 1st Sess. 3 (1945). The fleeting references in the legislative history of 28 U.S.C. 1505 to claims involving trust assets focus on the "misappropriations of Indian funds or of any other Indian property * * *." 92 Cong. Rec. 5313 (1946). As we noted in our brief (Br. 20-21), acts of misappropriation may constitute takings for which just compensation is required, whether the taking is accomplished by "breach of trust" or otherwise. See, *e.g.*, *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933). Nothing in the legislative history indicates that Congress intended anything other than to give Indians the same right to sue in the Court of Claims that had previously been accorded "his white or black neighbor" under 28 U.S.C. 1491. H.R. Rep. No. 1466, *supra*, at 3.

[2]Respondents acknowledge (Resp. Br. 2-3, 7) that the individual allottees include members of diverse tribal groupings who have simply brought their individual claims in this single suit. The fact that the individual claims have been joined in a single suit does not make the claims those of a tribal entity. Compare *Menominee Tribe of Indians* v. *United States*, 388 F. 2d 1000, 1001 (Ct. Cl. 1967); *Tee-Hit-Ton Indians* v. *United States*, 120 F. Supp. 202 (Ct. Cl. 1954), aff'd, 348 U.S. 272 (1955). The claim of the Quinault Tribe, which concerns separate lands, is a separate claim in this consolidated suit.

The court below did not rest its decision as to individual claimants upon 28 U.S.C. 1505, but on the Tucker Act, 28 U.S.C. 1491 (Pet. App. 4a). Nor did it hold that the Quinault Allottees Association qualifies as a plaintiff under Section 1505 (see Pet. Br. 9 n.4). The heterogeneity of its membership, and the recent formation of the Association in 1968 for the purpose of bringing this action (Resp. Br. 2-3, 7) preclude maintenance of claims by the Association under Section 1505. Moreover, neither the Association nor the Quinault Tribe may maintain this suit under Section 1505 to present claims for the individual allottees. *Minnesota Chippewa Tribe* v. *United States*, 315 F. 2d 906, 914 (Ct. Cl. 1963); *Sioux Tribe of Indians*, 89 Ct. Cl. 31, 38 (1939). Accordingly, Section 1505 is relevant to this action at most insofar as the Quinault Tribe may be able to show that it holds land in its own right, in allotment tenure, as successor to individual allottees (see Pet. Br. 9 n.4).

2. Respondents contend that the General Allotment Act and other statutes provide the consent to suit necessary for maintenance of claims under 28 U.S.C. 1491 (Resp. Br. 28-46).[3]

a. First, they assert that *any* congressionally established trust duty creates a right to recover money damages for breach of the trust (Resp. Br. 30-32). But this Court has already rejected "as unsound" the claim that a statute establishing substantive rights "of necessity create[s] a waiver of sovereign immunity such that money damages are available to redress their violation." *United States* v. *Testan*, 424 U.S. 392, 400-401 (1976). See also *United States* v. *King*, 395 U.S. 1, 4 (1969). As we explained in our opening brief (Br. 20-21), because of the availability of injunctive and mandamus relief as well as compensation for Fifth Amendment takings, the

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[3]Respondents' reliance on statutes other than the General Allotment Act is discussed at pages 28-29 and nn.18-19 of our opening brief. Consideration of these statutes may properly be left to the Court of Claims on remand. Plainly, they do not support the broad holding below that the United States is liable in money damages for any "breach of trust" in the management of allotted lands.

substantive provisions of the General Allotment Act are not ineffective merely because they do not also provide a damage remedy for "breach of trust." Thus, "[t]he situation * * * is not that Congress has left respondents remediless, * * * but that Congress has not made available * * * the remedy of money damages." *United States* v. *Testan*, *supra*, 424 U.S. at 403.[4]

b. Respondents have divorced their legal contention that *any* express statutory trust creates a right to recover money damages (Resp. Br. 30-32) from discussion of the substance and nature of the "trust" under the General Allotment Act (*id.* at 41-46). As we demonstrated in our opening brief (Br. 21-29), Congress neither intended nor envisioned that the General Allotment Act place the government in the role of an active managing trustee of allotted lands. As respondents acknowledge (Resp. Br. 4, 42), Congress intended that Indians would take up residence on their individual allotments and themselves manage the lands.

Moreover, respondents do not dispute that the limited purposes of the "trust" tenure for allotments established by the General Allotment Act was to preserve the lands from improvident alienation and to keep the land immune from state taxation (Br. 21-29; Resp. Br. 42). Instead, respondents contend that these limited objectives were somehow transferred into a managing trustee relationship when the Department of the Interior began overseeing timber sales on Quinault allotments in 1920.[5]

[4]Like respondents in this case, the respondents in *Testan* claimed that the statute under which they sued "makes available any and all generally accepted and important forms of redress, including money damages." 424 U.S. at 400. The Court rejected that claim because there, as here, the statute establishing substantive rights did not purport to create a right to money damages for its violation. *Id.* at 398-407.

[5]These responsibilities are performed under a power of attorney granted by each individual allottee (Resp. Br. 5).

Of course, the acts of officials of the Department of the Interior cannot by themselves create a waiver of the sovereign immunity of the United States. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940); *United States* v. *Shaw*, 309 U.S. 495, 501 (1940); *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232 (1887). And the statutes that guide the Secretary of the Interior in conducting timber sales on allotted and other restricted lands—25 U.S.C. 406 and 25 U.S.C. 446—do not reflect any congressional intent to consent to suit in money damages against the United States for "breach of trust" in performing these management functions. See note 3, *supra*. For the reasons we discussed in our opening brief (Br. 28-29 nn.18-19), the Court of Claims properly eschewed any reliance on these statutes in reaching its conclusion that the General Allotment Act creates a right to money damages against the United States for "breach of trust" in the management of allotted lands.

c. Respondents argue (Resp. Br. 30-31, 38-41) that "trust" responsibilities created either by the General Allotment Act or by the Treaty of Olympia create an implied contract within the scope of the Tucker Act, 28 U.S.C. 1491. These contentions were not raised in the court below or addressed by that court, and are therefore not properly advanced here. See, *e.g.*, *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967). In any event, respondents' claims are erroneous.

The relationship established by the General Allotment Act in no respect resembles an ordinary consensual contract. The usual incidents of an express or implied-in-fact contract are wholly lacking.[6] What respondents' assertion amounts to is the contention that a contract is implied in law by the statute. But the Court of Claims plainly lacks jurisdiction over implied-in-law contracts. *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926).

Similarly, the Court of Claims has no jurisdiction under 28 U.S.C. 1491 over individual claims based on treaties. Compare 28 U.S.C. 1491 with 28 U.S.C. 1505.[7] Respondents cannot circumvent this express limitation on the court's jurisdiction merely by recasting the treaty claim in contract form; if their contention were correct,

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[6]Moreover, with exceptions noted below, unlike true contractual claims, there is here neither a fund paid into the United States Treasury by respondents commensurate with the liabilities alleged, nor a government promise to pay a liquidated or readily determinable sum. As we observed in our brief in *Testan*, these factors distinguish contractual claims and claims for recovery of funds unlawfully exacted or retained from all other claims. Reply Brief for the United States at 7 n.2. Contrary to respondents' suggestion (Resp. Br. 31), the liabilities sought to be fastened upon the United States in this case were neither determinable nor foreseeable to Congress when it adopted the General Allotment Act (see Br. 21-29). Maintenance of such claims depends upon identification of an express congressional authority mandating compensation.

Insofar as respondents' claim for allegedly excessive administration and road fees may prove to constitute claims for money unlawfully exacted or wrongfully withheld, a corresponding fund for their payment has been created on respondents' behalf, and the United States has not urged any sovereign immunity bar (Br. 16 n.6).

[7]The status of any tribal claim based on the Treaty of Olympia under 28 U.S.C. 1505 is not at issue in this case.

the limitation on the court's jurisdiction under 28 U.S.C. 1491 would be meaningless.[8] See *Menominee Tribe of Indians* v. *United States*, *supra*, slip op. 5 n.7.

3. Respondents persist in their contention (Resp. Br. 46-49) that the question presented in this case previously has been decided in their favor in several courts. This contention is in error for the reasons stated on page 3 and and nn.3-4 of the Reply Memorandum for the United States filed in response to respondents' brief in to the opposition petition.

CONCLUSION

For the reasons stated here and in our opening brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

NOVEMBER 1979

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[8]Respondents' argument would also vitiate the doctrine of sovereign immunity as applied to statutory claims. It would be an unimaginative claimant indeed who could not conjure up some action he took in reliance upon a presumed statutory right, which would be sufficient, on respondents' theory, to create an implied contract affording a right to money damages. The respondents in *Testan* could have argued, for instance, that government adherence to the terms of the Classification Act was implicitly incorporated in the terms of their employment, and was therefore guaranteed by contract.

DOJ-1979-11

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 78-1756

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN MITCHELL, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Claims

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME
and
BRIEF
of
CHLOE WHISKERS, ET AL., AS AMICI CURIAE

Richard W. Hughes
805 Tijeras, N.W.
Albuquerque, New Mexico 87102
Telephone: 505/842-6123

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE OUT OF TIME

Chloe Whiskers, *et al.*, the plaintiffs in *Whiskers v. United States*, 600 F.2d 1332 (10th Cir. 1979), move the Court for leave to file the attached brief as *amici curiae* in this proceeding. Consent of the parties has been sought. Respondents have consented, but the United States has refused to consent.

Amici consist of a class of largely impoverished southern Paiute Indians, most of whom live in desert regions of Utah and Nevada. Their interest arises from the cited decision, which raises an issue very similar to the question under review here, albeit under a different substantive statute. *Amici* are preparing to petition for review of that decision.

This motion should be granted despite its late submission for the following reasons:

1. *Amici* discuss a material point on which they disagree with the briefs of both parties. Their view may assist the Court, and the need to state it was not known until the parties' briefs were already on file.

2. The point briefed is by its nature already covered in the brief of the adverse party, the United States. Therefore there is no prejudice from the late filing.

Respectfully submitted,

Richard W. Hughes
805 Tijeras, N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 842-6123

Counsel for Amici Curiae

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STATUTES

OTHER

BRIEF OF AMICI CURIAE

INTEREST OF AMICI

The interest of amici curiae is set out in the Motion for Leave to File Brief of Amici Curiae, ante at i.

ARGUMENT

THE TUCKER ACT GRANTS THE CONSENT OF THE UNITED STATES TO BE SUED FOR BREACH OF A STATUTORY TRUST, AND THE SOLE ISSUE HERE IS WHETHER PLAINTIFFS HAVE MADE OUT A CAUSE OF ACTION TO RECOVER MONEY DAMAGES AGAINST THE UNITED STATES UNDER THE STATUTES

The court below correctly defined the issue in this case as whether 28 U.S.C. 1491 embraces actions against the United States for breach of a statutory trust. Some passages in the United States' brief attempt to equate this issue with the distinct question of consent of the United States to be sued. Pet. Br. 11-21. Respondents do not dispute that characterization. See, Resp. Br. 14-45. Amici urge that the history and language of the Tucker Act and decisions of the courts interpreting it make clear that by the Tucker Act the United States consents to be sued in actions founded on a statute. The only valid inquiry here is whether there is a cause of action for damages

against the United States under the particular statutes at issue.[1]

The Court of Claims was created in 1855. 10 Stat. 612. Though called a court, its function was only to investigate claims against the United States "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States" and to report its findings and recommendations to Congress. Id. §§ 2, 7. In 1863 the Court was empowered to render final judgments, from which appeals to this Court could be taken. 12 Stat. 765. There is no published legislative history of these acts bearing on the instant case.[2]

1/ On this point amici agree with the decision of the Court of Claims for the reasons stated in its opinion. Also, the Court in United States v. Mason, 412 U.S. 391 (1973), decided an Indian's breach of trust claim on the merits, noting that jurisdiction was based on the Tucker Act. 412 U.S. at 394 n.5. Jurisdiction had been adjudicated in the Court of Claims, but the United States abandoned the issue before this Court.

2/ H.R. Rep. No. 1077, 49th Cong., 1st Sess. (1886), the report that accompanied Rep. Tucker's bill (H.R. 6974), contained lengthy excerpts from an article by the Chief Justice of the Court of Claims in Southern Law Review of March 1882, giving the history of the court from its origin and discussing Congress's consideration of the 1855 and 1863 Acts.

In 1886 Representative Tucker of Virginia, chairman of the House Judiciary Committee, introduced the bill which became the Act of that name, H.R. 6974, 49th Cong., 1st Sess. (1886). The history of the Act makes it clear that all concerned viewed the Act as a substantive waiver of the United States' sovereign immunity in favor of the "honest private claims" of the citizenry. H.R. Rep. No. 1077, 49th Cong., 1st Sess. 4 (1886).

The Act itself was entitled "An Act to provide for the bringing of suits against the United States." Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (1887). It effected a complete overhaul of the Court of Claims organization and procedure and broadened the jurisdictional grant to include claims "for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable...." Id. § 1.[3] The committee believed this phrase

3/ In the 1948 revision of 28 U.S.C., 62 Stat. 940, the codifiers omitted from § 1491 (§ 1 of the Tucker Act) the language following "cases not sounding in tort," which had been in the statute since the Act was passed in 1887. See 28 U.S.C. 1491. The legislative history, H.R. Rep. 308, 80th Cong., 1st Sess. 138 (1947)(reprinted at 28 U.S.C.A. 1491 Reviser's Note), states that the language was viewed as surplusage:

embraced "a large class of cases," H.R. Rep. No. 1077, id., at 3.[4] The title and language of the bill sufficiently demonstrate that one of its principal purposes was to waive the Government's immunity. The debates in the House leave no room for further doubt. When the bill was first considered on January 13, 1887, the following exchange occurred between Rep. Tucker and Rep. Reed:

> MR. REED. Is the bill sufficiently broad to cover all claims against the United States? Does it give the right to sue the United States in all cases?
>
> MR. TUCKER. Not in all cases.
>
> MR. REED. I mean in all cases where there is a claim of right in law or equity, technically so called.

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3 cont'd/ [The] [w]ords "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable" were omitted as unnecessary since the Court of Claims manifestly, under this section will determine whether a petition against the United States states a cause of action...." That change, of course, had no impact on the scope or effect of the Act.

4/ The bill on which the committee reported, H.R. 6974, did not contain the language "in cases not sounding in tort." See e. g. 18 Cong. Rec. 623 (1887). That addition was made on the Senate floor, Id. at 2175. Presumably, the "large class of cases" was substantially diminished by the exclusion of tort cases.

> MR. TUCKER. Yes; equity and admiralty. The only cases not provided for are suits upon the use of a patent right by the Government and suits in reference to captured and abandoned property which are now barred by the statutes of limitations. This bill extends the jurisdiction of the Court of Claims to all cases which arise, not only ex contractu but ex delicto, and to cases in admiralty, so that it will take the whole mass of these claims away from Congress.
>
> * * *
>
> MR. REED. As this is a somewhat long bill, I desire to ask another question. As I understand, the effect of the bill is that the United States can be made a party defendant in any suit where an individual could be made a party defendant.
>
> MR. TUCKER. Yes, sir.

18 Cong.Rec. 622 (1887). Two months later, after the Senate had passed the final version of the bill and it was before the House for final action, Rep. Townshend of Illinois spoke in opposition to it, saying that "If this bill should pass it will make the government a defendant in nearly all cases where a private citizen could...." 18 Cong.Rec. 2679 (1887). Rep. Bayne concluded the debate, urging that the bill pass so as to

> give the people of the United States what every civilized nation of the world has already done -- the right to go into the courts and seek redress against the government for their grievances.

Id. at 2680. Moments later the Tucker Act became law.

This Court first considered the scope of the Tucker Act's jurisdictional provision in United States v. Jones, 131 U.S. 1 (1889), and there held that it did not include suits for equitable relief only.[5/] The Court described the issue before it as being the extent to which the legislature had subjected "government itself, equally with individuals, to the jurisdiction of its own courts...." Id. at 19.

Later opinions of the Court have consistently recognized that the Tucker Act, and its predecessor acts, constituted waivers of the government's sovereign immunity. For example, in Dalehite v. United States, 346 U.S. 15, 26 n.10 (1953), the Court said:

> In 1855, Congress established the Court of Claims and consented to suit therein on claims based on contract or federal law or regulation. This consent was enlarged in 1887 to include all cases for damages not sounding in tort.

To the same effect is Soriano v. United States, 352 U.S. 270, 273 (1957).

The Court's most extensive discussion of the consent-to-suit aspect of the Tucker Act was in United States v. Sherwood, 312 U.S. 584 (1941). Sherwood involved the question whether under the

5/ See United States v. King, 395 U.S. 1 (1969), in which the Court held the Court of Claims had no jurisdiction to grant relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Tucker Act, a judgment creditor could sue the United States as subrogee of his debtor's claim against the United States for breach of contract. In answering the question in the negative, the Court examined the Tucker Act carefully, saying (at 590):

> The section must be interpreted in light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted.

Numerous other passages throughout the opinion in Sherwood refer to the Tucker Act as "a waiver of sovereign immunity," id., "the Government's consent to be sued," id. at 591, 592, and comparable terms. Sherwood is so clear on this point that no other authority should be necessary to establish that the Tucker Act constitutes both a grant of jurisdiction and a waiver of sovereign immunity for those cases within its terms. Numerous other authorities may be found, however, throughout the body of federal case law.[6/] And see 14 Wright & Miller, Federal

6/ Porter v. United States, 496 F.2d 583, 586 (Ct. Cl. 1974); Pasha v. United States, 484 F.2d 630, 633 (7th Cir. 1973); Konecny v. United States, 388 F.2d 59, 62 (8th Cir. 1967); Jacobsen v. Tahoe Regional Planning Agency, 558 F.2d 928, 940 (9th Cir. 1977); Whiskers v. United States, 600 F.2d 1332, 1335 (10th Cir. 1979); International Engineering Co. v. Richardson, 512 F.2d 573, 577 (D.C. Cir. 1975); Nelson v. United States, 341 F.Supp. 1353, 1354 (D. Mont. 1972); Vigil v. United States, 293 F.Supp. 1176 (D. Colo. 1968); Jentry v. United States, 73 F.Supp. 899, 901 (S.D. Cal. 1947); McMichael v. United States, 63 F.Supp. 598, 599 N.D. Ala. 1945).

Practice and Procedure, § 3656, p. 202 (1976):

> Probably the two best-known exceptions to the sovereign immunity doctrine are the Tucker Act and the Federal Tort Claims Act.

It is abundantly clear that from its enactment forward the Tucker Act has been viewed as granting the consent of the United States to be sued in those categories of cases therein enumerated. Were that not so, there would be no other way for contract claims to be brought against the United States. If the Act does not grant the Government's consent to be sued on such claims, the claims cannot be entertained. No federal contract grants consent, nor does any federal contracting officer have the authority to waive the government's immunity. Henninger v. United States, 473 F.2d 814, 816 (9th Cir. 1973). The same is true of claims founded upon "any regulation of an executive department," 28 U.S.C. 1491.

The source of confusion on what had been settled law is a few passages in the Court's decision in United States v. Testan, 424 U.S. 392 (1976). Testan has caused difficulty for some lower courts.7/

7/ See, e.g., State of Texas v. United States, 537 F.2d 466, 473 (Ct.Cl. 1976), concurring opinion of Nichols, J. Several federal courts of appeals have held, on the strength of Testan alone, that the Tucker Act is not a consent to suit. Johnson v. Mathews, 539 F.2d 1111, 1122 (8th Cir. 1976); Tatum v. Mathews, 541 F.2d 161, 165 (6th Cir. 1976); Fitzgerald v. United States Civil Svc. Comm'n, 554 F.2d 1186, 1189 (D.C.

While the decision is relevant to the instant case, it did not rewrite the Tucker Act.

Before this Court, the Testan plaintiffs argued that the Tucker Act waived sovereign immunity and granted jurisdiction over every claim that a substantive right created by federal statute had been violated. The Court disagreed, holding that only statutes (or regulations) that clearly mandate payment of money to identifiable persons or groups give rise to a cause of action for damages against the United States. The opinion established a relatively strict standard, taken from Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct.Cl. 1967), for determining which statutes should be held to establish such causes of action.

Essential to the Court's ruling was the distinction between subject matter jurisdiction over a claim, waiver of sovereign immunity, and the existence of a cause of action.8/ The Tucker Act describes certain types of causes of actions against the United States,

7 cont'd/ Cir. 1977); Hill v. United States, 571 F.2d 1098, 1101 (9th Cir. 1978); Polos v. United States, 556 F.2d 903, 906 (8th Cir. 1977); McCulloch Gas Processing Corp. v. Canadian Hydrogas Resources, Ltd., 577 F.2d 712, 716-17 (E.Ct. of App. 1978).

8/ The jurisdiction/cause of action distinction is discussed at length in Cort v. Ash, 422 U.S. 66 (1975). And see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

for which it confers jurisdiction on the Court of Claims (and the district courts for claims for less than $10,000) and waives the government's immunity from suit. The jurisdictional grant and the waiver of immunity are completely congruent; as stated in United States v. Sherwood, supra, (312 U.S. at 591):

> This matter is not one of procedure but of jurisdiction, whose limits are marked by the Government's consent to be sued.

And see United States v. Testan, supra 424 U.S. at 399, quoting Sherwood. The determination of what causes of action fall within those limits can be a more detailed inquiry. Contract claims constitute a reasonably clear category, but claims "for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491, do not. The Court of Claims once referred to that phrase as an "amorphous and unfamiliar part of our jurisdiction." Eastport S.S. Corp. v. United States, supra, 372 F.2d at 1013.9/ Testan involved the question of when a Tucker Act claim may properly deemed "founded upon an Act of Congress." The Court said that the "grant of a right of action must be made with specificity," 424 U.S.

9/ But see United States v. Cornell Steamboat Co., 202 U.S. 184 (1906), where jurisdiction over a libel for salvage was sustained on the basis of that provision.

at 400, and the Court found no such cause of action in the statutes at issue. See Duarte v. United States, 532 F.2d 850 (2d Cir. 1976).

The language of the opinion, however, is asserted by the Government to mean that the Tucker Act does not waive sovereign immunity at all, and that for an Act of Congress to give rise to a claim for damages against the United States that Act must not only intend a cause of action but must separately and distinctly contain a waiver of sovereign immunity. The error of that interpretation is apparent when considered in light of claims founded upon contracts and regulations. Cf. Neely v. United States, 554 F.2d 114, 115 (3d Cir. 1977). Even in the context of acts of Congress, it would preclude virtually all claims, since Congress does not normally add waivers of sovereign immunity to its enactments. Respondents' Brief (at 14-41), provides an example of the confusion and uncertainties that would be erroneously introduced into the field of Tucker Act litigation, should the reading given Testan by the Government here be accepted by the Court. Amici submit that acceptance of this view of Testan would set litigation in the Court of Claims back 125 years. Sovereign immunity may be a time-honored doctrine, but there is no need today for it to be restored to the position it occupied in 1855.

CONCLUSION

For the reasons stated, the decision of the Court of Claims should be affirmed.

Respectfully submitted,

Richard W. Hughes
805 Tijeras, N.W.
Albuquerque, N.M. 87102
Telephone: (505) 842-6123

Counsel for Amici Curiae

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